EDITOR'S NOTE

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(1)

o. 85-5189-CFY
tatus: GRANTED

Title: Lamont Julius Mclaughlin, Petitioner
v.
United States

ocketed:
ugust 5, 1985

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Cribari, Stephen J.

Counsel for respondent: Solicitor General

ntry	Date	Note	Proceedings and Orders
1	Aug 5 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 3 1985		Order extending time to file response to petition until October 6, 1985.
6	Oct 7 1985		Order extending time to file response to petition until November 7, 1985.
7	Oct 9 1985		Brief of respondent United States in opposition filed.
8	Oct 15 1985		Reply brief of petitioner Lamont J. McLaughlin filed.
9	Oct 17 1985		DISTRIBUTED. November 1, 1985
11	Nov 4 1985		Petition GRANTED.
			**********
12	Nov 7 1985		Record filed.
13	Nov 15 1985	G	Motion of petitioner for appointment of counsel filed.
14	Nov 18 1985		DISTRIBUTED. Nov. 27, 1985. (Above motion).
15	Dec 2 1985		Motion for appointment of counsel GRANTED and it is ordered that Stephen J. Cribari, Esquire, of Baltimore, Maryland, is appointed to serve as counsel for the petitioner in this case.
16	Dec 9 1985		Joint appendix filed.
17	Dec 13 1985		Brief of petitioner Lamont J. McLaughlin filed.
19	Jan 7 1986		Order extending time to file brief of respondent on the merits until February 7, 1986.
20	Feb 4 1986		SET FOR ARGUMENT, Monday, March 31, 1986. (3rd case)
21	Feb 7 1986		Brief of respondent United States filed.
22	Feb 21 1986		CIRCULATED.
23	Mar 20 1986	X	Reply brief of petitioner Lamont J. McLaughlin filed.
24	Mar 31 1986		ARGUED.

EDITOR'S NOTE

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No. 85-5189 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN,

PETITIONER

v.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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RHP

QUESTION PRESENTED FOR REVIEW

Whether a conviction for use of a dangerous weapon during a bank robbery, in violation of 18 U.S.C. §2113(d), despite proof by the government that the weapon used was not dangerous, violates a defendant's right to a fair trial?

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MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No._____

LAMONT JULIUS MCLAUGHLIN,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Lamont Julius McLaughlin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 5, 1985.

OPINION BELOW

On June 5, 1985, the United States Court of Appeals for the Fourth Circuit affirmed Mr. McLaughlin's conviction for use of a dangerous weapon during a bank robbery. Appendix at A-1. Mr. McLaughlin's conviction was entered on October 29, 1984, by the United States District Court for the District of Maryland. Appendix at A-2.

JURISDICTION

On June 5, 1985, the United States Court of Appeals for the Fourth Circuit summarily affirmed Mr. McLaughlin's conviction for use of a dangerous weapon during a bank robbery, entered on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). See Supreme Court Rule 17.1(a), (c).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2113(a), (d):

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT OF THE CASE

On July 31, 1984, the grand jury for the District of Maryland returned a three-count indictment in which Lamont Julius McLaughlin and a co-defendant were charged with bank robbery, bank larceny, and assault with a dangerous weapon during the commission of these offenses, all in violation of 18 U.S.C. §2113(a), (b), (d), (f). At his arraignment on August 10, 1984, Mr. McLaughlin entered pleas of not guilty to these charges and was held in custody in lieu of bond. On September 9, 1984, Mr. McLaughlin entered pleas of guilty to the charges of bank robbery and bank larceny (counts one and two of the indictment). He was found guilty of the armed assault charge (count three of the

indictment) after a bench trial based on stipulated evidence.[1]

After completion of a presentence investigation report by the United States Probation Office, Mr. McLaughlin was, on October 29, 1984, sentenced as follows: Commitment to the custody of the Attorney General for a period of imprisonment of twenty (20) years on count one, eight (8) years on count two, and twenty-five (25) years on count three, counts one and two to be served concurrently with each other and concurrently with count three. Mr. McLaughlin is to become eligible for release on parole after serving one-third of his sentence, pursuant to 18 U.S.C. §4205(a).

Notice of Appeal was filed timely on October 30, 1984. On April 4, 1985, Mr. McLaughlin filed his Appellant's Brief and Joint Appendix with the United States Court of Appeals for the Fourth Circuit, along with a Motion to Adopt and Consolidate his Appeal with that of United States of America v. Lawrence Edward Johnson, Jr., No. 83-5268. The Federal Defender's Office for the District of Maryland represented both appellants and the sole issue raised by Mr. McLaughlin was similar to the third of three issues raised by Mr. Johnson. That Motion was granted by the Fourth Circuit on April 10, 1985, and the cases were consolidated for purposes of appeal.

Appellants then filed a Suggestion for Initial Hearing In Banc, on April 11, 1985. Thereafter, the Government filed a consolidated Brief in both appeals and also moved for summary affirmance and deconsolidation of Mr. McLaughlin's Appeal. Mr. McLaughlin filed his Response to Appellee's Motion for Summary Affirmance and for Deconsolidation on May 23, 1985. On June 5, 1985, the United States Court of Appeals for the Fourth Circuit granted the Government's Motion, sumarily affirming and

[1]. The statement of facts proffered by the Government in support of the guilty plea served as the stipulated evidence on which Mr. McLaughlin was convicted of count three of the indictment.

deconsolidating Mr. McLaughlin's appeal.

This Petition for Writ of Certiorari has followed.

STATEMENT OF FACTS

At 9:30 a.m. on July 26, 1984, two black males wearing gloves and stocking masks entered the federally insured Equitable Bank at Cedonia Mall, Radecke Avenue, Baltimore, Maryland. One of these men was Mr. McLaughlin, who positioned himself in the lobby area and, at gunpoint, ordered everyone in the bank to put up their hands and not to move. The other was Ronald Hall, the co-defendant. He vaulted over the tellers' counters and ordered one of the tellers to open a money drawer. After Mr. Hall removed the money from that drawer, he repeated the procedure with another teller. When Mr. Hall noticed a Baltimore City police officer outside the bank, he and Mr. McLaughlin fled.

As they ran out of the bank they were confronted by the Baltimore City police officer who held them at gunpoint until police support arrived. At that time various items were seized from Mr. McLaughlin and his co-defendant, including a brown paper bag containing $3400 in United States currency bound with bank wrappers, and the handgun displayed by Mr. McLaughlin in the lobby of the bank. As the Assistant United States Attorney stated during the guilty plea and bench trial: "the evidence would show (that this handgun) was not loaded." Appendix at A-7.

Although Mr. McLaughlin initially identified himself using an alias, he was quickly identified correctly whereupon he confessed to the crime with which he was charged, and implicated his co-defendant.

REASONS FOR GRANTING CERTIORARI

This case presents one issue for review:

Whether a conviction for using a dangerous weapon during a bank robbery, in violation of 18 U.S.C. 2113(d), when the Government's evidence is that the weapon, an unloaded handgun, was not dangerous, violates a defendant's right to a fair trial.

On this issue there is a split among the Circuits. The Second, Eighth and Ninth Circuits have held that an unloaded handgun is not a dangerous weapon and may not support a conviction under 2113(d).

The Fourth Circuit has consistently followed its ruling in United States v. Bennett, 697 F.2d 596 (4th Cir. 1982), allowing a conviction under 2113(d) for use of an unloaded handgun during a bank robbery.

No other Circuit has adopted the Bennett rule in the face of direct evidence that the weapon was not dangerous.

I. A DEFENDANT'S RIGHT TO A FAIR TRIAL IS VIOLATED WHEN HE IS CONVICTED OF USING A DANGEROUS WEAPON DURING A BANK ROBBERY WHEN THE GOVERNMENT'S EVIDENCE PROVES THE WEAPON WAS NOT DANGEROUS

In addition to the bank larceny and bank robbery charges to which Mr. McLaughlin pled guilty, he was convicted of the aggravated form of bank robbery proscribed by 18 U.S.C. §2113(d), which carries an enhanced penalty. The bench trial, which lasted but a few minutes, was based on stipulated evidence.

The stipulated evidence proffered at Mr. McLaughlin's bench trial (found in the Appendix at A-3 to A-12) alleged that Mr. McLaughlin entered a bank with another person. During the robbery, Mr. McLaughlin remained in the lobby area, pointing an unloaded handgun generally at the people in the bank.

The essential starting point of an analysis of this issue is the simple truism that §2113(a) and §2113(d) are different and were plainly meant to be different. These subsections provide, in petinent part, that:

> (a) Whoever, by force and violence, or by intimidation, takes, or atempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

* * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

The first, charging bank robbery, contemplates assaultive behavior - "by force and violence, or by intimidation" - in the taking or attempt to take money or property from a financial institution. The second contemplates, in part, an assault aggravated "by the use of a dangerous weapon or device." Common sense and precendent establish beyond question that the term "assaults" is so modified, and that the language of §2113(d) "clearly requires the commission of something more thant he elements of the offense described in §2113(a)." United States v. Beasley, 438 F.2d 1279, 1283 (6th Cir. 1971); Simpson v. United States, 435 U.S. 6, 11 n.6 (1978). It is equally clear, of course, that an interpretation of the aggravating element of §2113(d) must recognize and incorporate this basic difference between these two subsections of the fedeal bank robbery statute.

A number of courts have construed §2113(d) in manner which maintains this distinction within, and the integrity of, this statutory scheme. See, e.g., United States v. McAvoy, 574 F.2d 718, 720-22 (2nd Cir. 1978); United States v. Cobb, 558 F.2d 486, 488 (8th Cir. 1977); United States v. Potts, 548 F.Supp. 1239 (N.D. Calif. 1982). In essence, these courts find that an "apparent ability" to carry out a threat to inflict bodily injury does not alone satisfy the aggravated elements of §2113(d). Rather, an objective capability, i.e., a loaded firearm, must be established by direct proof or permissible inference. on the other hand, a number of circuits have not required this "objective capability" to carry out such a threat, and have permitted conviction under this subsection regardless of the existence of any proof that the gun was loaded or fired during

the robbery. See, e.g., United States v. Shanahan, 605 F.2d 539 (10th Cir. 1979). United States v. Beasley,, 438 F.2d 1279 (6th Cir. 1971).

In a variety of factual settings, the Fourth Circuit has adopted the latter, subjective standard, and has refused to require the prosecution to demonstrate that a firearm was in fact operable and loaded during the robbery. In United States v. Shelton, 465 F.2d 361 (4th Cir. 1972), the bank robber had menacingly pointed a sawed-off shotgun at bank employees during the course of the robbery. The Fourth Circuit specifically noted that, while the gun was loaded, the defendant did not offer any testimony whatsoever that the gun was, in fact, unloaded or would not fire. Id. at 363. The Fourth Circuit's decision that the evidence supported a conviction under §2113(d) rested firmly on the perception that to require the prosecution to prove that the gun was loaded or fired during the robbery would be "to adopt a construction so rigid in its application as to make a nullity of the statute and to rob it of its manifest purpose." Id. at 362. Again referring to the undesirability of placing such a burden of proof on the prosecution, the court later observed that the actual facts concerning this question are peculiarly known to the perpetrators of the crime and unavailable to law enforcement. Therefore, the Fourth Circuit concluded that to adopt Shelton's position "would serve to render this section of the statute totally ineffective." Id. at 363.

In United States v. Newkirk, 481 F.2d 881 (4th Cir. 1973), the defendant was charged with putting a life in jeopardy during a bank robbery, pursuant to 18 U.S.C. §2113(d). There, the robber pointed a firearm, described as a .38 caliber revolver, at a teller as he ordered her to fill a bag with money. Without further analysis, the Fourth Circuit found the holding in Shelton to be controlling. Thus, following the proposition that an aggravated assault under §2113(d) has been committed

"irrespective of whether there was any proof that the gun was loaded or fired during the robbery," the court upheld the conviction of assaulting or placing in jeopardy the life of the teller. Id. at 883, quoting Shelton, 465 F.2d at 363. Apparently, as in Shelton, the defense did not establish or seek to prove that the firearm was, in fact, not loaded or otherwise incapable of being fired.

The upshot of the Fourth Circuit's decisions in Shelton and Newkirk is, at a minimum, that a presumption of danger, sufficient to satisfy the aggravated element of §2113(d), will arise upon proof that a firearm was displayed during a robbery. Given the absence of any proof that the firearm was unloaded or inoperable, these cases may stand for no more than the proposition that the requisite danger is presumed if a firearm is displayed.3/ In any event, based on the Shelton analysis, followed in Newkirk without explication, it is apparent that the Fourth Circuit was concerned with placing an unrealistic burden on the prosecution to prove that the firearm was, in fact, loaded or capable of firing. In order to avoid this difficult burden of proof and to give effect to the statutory scheme, the Fourth Circuit did not require a showing of the weapon's inherent dangerousness in the absence of direct contradictory evidence.

However, the Fourth Circuit moved well beyond the realm of permissible inferences or presumptions in United States v. Bennett, 675 F.2d 596 (4th Cir. 1982). There, the rifle used in the robbery was found cocked but unloaded in an alley outside the bank. Based on this direct proof that the firearm did not have the actual, as opposed to apparent, capability to harm, the defendant sought to distinguish Shelton and Newkirk and contended

3/. Relevant to whether the Fourth Circuit merely established a presumption to benefit the prosecution is its observation that some courts have reached substantially the same result as in Shelton "by finding that the brandishing of the gun in the face of bank employees warrants an inference that the gun was loaded." 465 F.2d at 363 n.1.

that the evidence did not satisfy the aggravated element of §2113(d). The court concluded broadly that "[a] weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded." Id. at 599. Concluding that such mere exhibition violates §2113(d), the court emphasized the potential harm generated by the display of weapons during a robbery:

> Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. A robber might well strike a recalcitrant teller with an unloaded rifle; a guard or a passing policeman, seeing a rifle displayed, might well reflexively fire his weapon, endangering robbers and bystanders alike; a threatening weapon might well trigger precipitous action on the part of frightened or nervous bank employees or bystanders.

Id. Proceeding on this basis, the Fourth Circuit affirmed the conviction under 2113(d).

However, Bennett is neither legally sound nor factually controlling of the present case.

I. (1) It is Legally Unsound to Convict Someone for Using a Dangerous Weapon During a Bank Robbery When the Dangerous Weapon is an Unloaded Handgun and Is, In Fact, Not Dangerous

First, it must be emphasized that Bennett was not compelled by the reasoning in Shelton and Newkirk. Those cases turned on the very practical concern of the Fourth Circuit that the enforcement of §2113(d) would be frustrated if the prosecution was called upon to prove that the weapon was loaded and operable. Indeed, the Fourth Circuit quite reasonably perceived that such a burden of proof would preclude most convictions under this subsection. The answer to this problem is to afford the prosecution the benefit of a presumption in caes like Shelton and Newkirk where no evidence as to the conditon of the weapon is available. Such a process eliminates the concern that the perpetrator may thwart a prosecution under §2113(d) by withholding information concerning the weapon which only he

possesses. The Bennett rationale moves well beyond the limited framework of Shelton and Newkirk, and thus establishes the per se rule that the mere open exhibition of a dangerous weapon satisifies §2113(d).

Second, the rationale underlying the Fourth Circuit's shift in Bennett fails to recognize and make meaningful the clear difference between the assaultive behavior of a §2113(a) robbery and the aggravated assault proscribed by §2113(d) for which enhanced penalties lie. In pointing to the inherent dangers which may attend a robbery where weapons are displayed, the Fourth Circuit posits that a robber could use the weapon as a bludgeon. However, any reasonably heavy object, or even a human fist, could satisfy this criterion. Plainly, to set apart the case of an unloaded firearm from these other situations is to eviscerate the intended distinction between subsections 2113(a) and 2113(d). The second scenario envisioned in Bennett - the danger posed by a third party's possible response to the display of a weapon - is on equally inadequate justification. A similar response by a teller may be precipitated by a demand note, threatening statements, or the not uncommon pretense of a hand thrust forward inside a coat or pants pocket. Likewise, bystanders' reactions to an unloaded firearm may be no different than the reaction to loud orders, threats by the robbers and/or physical contact between the robbers and innocent victims. Again, this rationale provides no basis for adequately distinguishing between §2113(a) an §2113(d).4/

The propostiion that an unloaded firearm does not satisfy the aggravated element of §2113(d) lest the distinction between

4/. Indeed, situations creating those dangers observed in Bennett have frequently been the subject of convictions only under §2113(a). See, e.g., United States v. Johnston, 543 F.2d 55, 59 (8th Cir. 1976) (object in robber's pocket thought to be gun was in fact pocketknife); United States v. Harris, 530 F.2d 576, 579 (4th Cir. 1976) (robber placed hand in pocket in manner suggesting a weapon); United States v. Alsop, 479 F.2d 65, 67 (9th Cir. 1973) (robber used toy gun).

that subsecton and subsection (a) be eliminated is not without substantial authority. In United States v. Cobb, 558 F.2d 486 (8th Cir. 1977), the court found that evidence of a loaded gun was the crucial element necessary to permit the sentence ehancement under §2113(d). The Eighth Circuit affirmed the requirement that, on the charge of aggravated bank robbery in violation of §2113(d), "[t]he weapon must be objectively capable of putting a victim's life in danger." Id. at 488.5/ Similarly, the Second Circuit in United States v. McAvoy, 574 F.2d 718 (2d Cir. 1978), acknowledged and confirmed earlier decisions that a robber must have the objective capability of committing an "assault" or of placing "in jeopardy the life of any person by the use of a dangerous weapon or device." Otherwise, as the Second Circuit recognized, subsection (d) would be indistinguishable from subsection (a) of §2113. Like the Eighth Circuit, the Second Circuit does not require the prosecution to establish that a firearm used by the robber was actually loaded because, under the circumstances, the jury might reasonably infer that fact. However, the Second Circuit explicitly stated that such inference arises only "absent a showing that the guns used in the robbery were unloaded." Id. at 720.

The Ninth Circuit has also indicated that the use of an unloaded gun during a bank robbery cannot provide a basis for a conviction under §2113(d). See United States v. Booth, 669 F.2d 1231, 1239-40 (9th Cir. 1981); United States v. Jones, 512 F.2d 347, 351-52 (9th Cir. 1975). In United States v. Potts, 548 F. Supp. 1239 (N.D. Calif. 1982), the trial court concluded that the case law provided a negative answer to the narrow question of

5/. In Cobb, the court noted that direct proof that a gun was loaded is not necessary and that this fact may be reasonably inferred from the context of a bank robbery. There, the court did not allow the jury to infer that a partially concealed object held by the robber was a loaded gun.

whether the commission of a bank robbery with an unloaded gun violates 18 U.S.C. §2113(d). The district court first observes the manifest congressional intent to distinguish between bank robbery under §2113(a) and the aggravated crime under §2113(d). The court proceeds to analyze and reject those arguments advanced by the Fourth Circuit in Bennett. In particular, the Ninth Circuit finds unpersuasive the "bludgeoning" prospect as sufficient to support a §2113(d)conviction. It states:

> [T]he argument that an unloaded gun is a dangerous weapon because it can be used for pistol whipping proves too much. Any heavy metal object, wooden club or human fist could be used to strike someone during the course of a robbery, yet to punish robberies accomplished with these objects under §2113(d) would eliminate any distinction between §2113(a) and §2113(d).

Id. at 1240-41. The district court also finds little support offered by the argument that an unloaded gun is a "dangerous weapon" because of the potential violent response by a bystander. Perceiving other situations that create a danger of retaliation equivalent to that caused by the display of an unloaded gun, the court found that this suggestion "also fails to provide a sound basis for distinguishing between §2113(a) and §2113(d)." Id. at 1241. Pursuant to its analysis, the district court held that the prosecution's failure to rebut the defendant's evidence suggesting that the gun was not loaded during the robberies precluded a conviction under §2113(d).

I. (2) The Facts of Petitioner's Case do not Support a Conviction for Using a Dangerous Weapon During a Bank Robbery

The present case fits squarely within the rationale of United States v. Potts and the circuits which require, by direct proof or permissible inference, that a firearm be loaded and operable to qualify as a "dangerous weapon or devise" under §2113(d). The particular facts of this case are clear, and expose the conceptual flaws of the Fourth Circuit's opinion in Bennett which destroys any meaningful distinction between

§2113(a) and §2113(d). Here the robber was displaying an unloaded handgun - not a rifle or a sawed-off shotgun. The robber remained in the lobby of the bank and pointed the unloaded handgun generally in the direction of people but approached no one directly. Thus, the potential risk that attended this robbery did not substantially differ from that attending other robberies punishable under §2113(a). Any incremental increase in that risk is wholly speculative and entirely inadequate to satisfy the congressionally intended distinction between §2113(a) and the aggravated form of robbery proscribed by §2113(d).

In sum, Mr. McLaughlin submits that his conviction should be reversed. The continued split among the Circuits, recent contrary authority, and the fact that no other circuit has adopted the Bennett rule in the face of direct evidence that the weapon was not dangerous demonstrates that the conviction for use of a dangerous weapon during a bank robbery should not be allowed when the Government presents evidence that the weapon (here, an unloaded handgun) used during the robbery was not dangerous.

CONCLUSION

The Fourth Circuit has summarily affirmed Mr. McLaughlin's conviction for using a dangerous weapon during a bank robbery despite the Government's evidence that the weapon was not dangerous. Given the split among the Circuits on this issue, a Writ of Certiorari should issue to the United States Court of Appeals for the Fourth Circuit so that this Court may clarify the constitutional right to a fair trial in this context.

Respectfully submitted,

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FILED
JUN 5 1985
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-5268(L)

United States of America,
Appellee,

versus

Lawrence Edward Johnson, Jr., etc.,
Appellant.

NO. 84-5335

United States of America,
Appellee,

versus

Lamont Julius McLaughlin,
Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge.

Upon consideration of appellee's motion for summary affirmance in United States v. Lamont Julius McLaughlin, appeal no. 84-5335 and for deconsolidation of that case from United States v. Lawrence Edward Johnson, Jr., a/k/a Sonny, appeal no. 83-5268(L) and the appellants' response thereto,

IT IS ORDERED that the motion for summary affirmance in appeal no. 84-5335 and for deconsolidation of the appeal from 83-5268(L) is granted.

Entered at the direction of Judge Chapman with the concurrence of Judge Sneeden and Judge Haynsworth.

For the Court,

JOHN M. GREACEN
CLERK

LAMONT JULIUS [illegible]AUGHLIN — THE [illegible]ISTRICT OF MARYLAND

DEFENDANT NO. 02 — [illegible] JH-84-00342

JUDGMENT AND XXXXXXXXXXXXX/COMMITMENT ORDER

COUNSEL
In the presence of the attorney for the government the defendant appeared in person on this date → October 29, 1984

[ ] WITHOUT COUNSEL [illegible]

[X] WITH COUNSEL Stephen Cribari, AFPD
(Name of Counsel)

PLEA
[X] GUILTY, and the court being satisfied that there is a factual basis for the plea. as to Counts 1 & 2
[ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT
There being a COURT verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. as to Count No. 3.

Defendant has been convicted as charged of the offense(s) of Count 1 - U.S.C., Title 18, Sections 2113(a)(f) & 2 - Bank Robbery; Aiding & Abetting; Count 2 - U.S.C., Title 18, Sections 2113(b)(f) & 2 - Bank Larceny; Aiding & Abetting; Count 3 - U.S.C., Title 18, Section 2113(d)(f) & 2 - Assault during Bank Robbery; Aiding & Abetting.

SENTENCE OR PROBATION ORDER
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) years as to Count 1, and for imprisonment for a term of Eight (8) years as to Count 2, and for imprisonment for a term of Twenty-Five (25) years as to Count 3, said terms of imprisonment as to Counts 1 & 2 are to run concurrent with each other and concurrent with the term of imprisonment imposed on Count 3. Defendant shall become eligible for release on parole after serving one-third (1/3) of such term of imprisonment, pursuant to U.S.C.,, Title 18, Section 4205(a).

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

COMMITMENT RECOMMENDATION
The court orders commitment to the custody of the Attorney General and recommends,

[illegible] October 31, 1984 [illegible]

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

[illegible]
CLERK, U. S. DISTRICT COURT
[illegible]
Deputy

JOSEPH C. HOWARD
Date October 29, 1984

ORIGINAL

No. 85-5189

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LAMONT JULIUS McLAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5189

LAMONT JULIUS McLAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was not using a "dangerous weapon" during a bank robbery because the gun he used to rob the bank was not loaded.

1. It is uncontested (see Pet. 6) that on July 29, 1984, petitioner and Ronald Tyrone Hill entered the Equitable Bank in Baltimore, Maryland, wearing stocking masks and gloves. Petitioner pointed a handgun at two tellers and at other individuals in the bank and ordered them to put up their hands. Hill then vaulted the counter, directed the two tellers to open their money drawers, and removed the money from the drawers. As the two men fled the bank, they were apprehended by a police officer, who recovered from them a brown paper bag containing $3,400 in currency. The handgun displayed by petitioner during the robbery was subsequently determined not to have been loaded.

Petitioner pleaded guilty to bank robbery, in violation of 18 U.S.C. 2113(a), and bank larceny, in violation of 18 U.S.C. 2113(b). After a bench trial on stipulated facts in the United States District Court for the District of Maryland, petitioner was convicted of using a dangerous weapon during the commission of a bank robbery, in violation of 18 U.S.C. 2113(d). He received concurrent sentences of twenty years for bank robbery,

eight years for bank larceny, and twenty-five years for bank robbery by use of a dangerous weapon. The court of appeals affirmed without opinion (Pet. App. A1).

2. Section 2113(d) provides for punishment of up to twenty-five years' imprisonment for any person who, while committing bank robbery or bank larceny, "assaults any person, or puts in jeopardy the life of any person by use of a dangerous weapon or device." 1/ Petitioner's contention that he did not violate Section 2113(d) because his gun was not loaded is wrong. Although it was not loaded, petitioner's gun was nevertheless a "dangerous weapon." By pointing it at the tellers and other persons, he both assaulted them and put their lives in jeopardy because an unloaded gun inspires apprehension, which may cause violence. As the Fourth Circuit explained in United States v. Bennett, 675 F.2d 596, 599, cert. denied, 456 U.S. 1011 (1982):

> Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. A robber might well strike a recalcitrant teller with an unloaded rifle; a guard or a passing policeman, seeing a rifle displayed, might well reflexively fire his weapon, endangering robbers and bystanders alike; a threatening weapon might trigger precipitous action on the part of frightened or nervous bank employees or bystanders. A weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates section 2113(d). 2/

Petitioner argues (Pet. 7-8, 12) that allowing an unloaded gun to qualify as a "dangerous weapon" eliminates the distinction between Section 2113(d) and Section 2113(a), which makes it a

1/ The phrase "by use of a dangerous weapon" modifies both "assaults" and "puts in jeopardy the life of any person." Simpson v. United States, 435 U.S. 6, 11-12 n.6 (1978).

2/ A number of courts have held that fake bombs, like unloaded guns, are "dangerous weapons" within the meaning of Section 2113(d). See United States v. Shannahan, 605 F.2d 539, 541-542 (10th Cir. 1979); United States v. Cooper, 462 F.2d 1343, 1344-1345 (5th Cir.), cert. denied, 409 U.S. 1009 (1972); United States v. Beasley, 438 F.2d 1279, 1282-1283 (6th Cir.), cert. denied, 404 U.S. 866 (1971); but see Bradley v. United States, 447 F.2d 264 (8th Cir. 1971).

crime to take property from a bank "by force and violence." There is no merit to this argument. A person can take property from a bank "by force and violence" without using a weapon of any sort. Section 2113(d) provides for additional punishment if, in addition to force, a weapon is used. 3/

3. Petitioner contends (Pet. 7) that the Second, Eighth, and Ninth Circuits have held that an unloaded handgun is not a dangerous weapon under Section 2113(d). While there is some confusion, there is no clear conflict among the circuits. Only one district court has taken a position squarely in conflict with the Fourth Circuit. Since robbers apparently do not frequently use unloaded guns to rob banks, review by this Court is not warranted in the absence of a clear conflict in the circuits.

There is no conflict with the Second Circuit. In United States v. McAvoy, 574 F.2d 718 (2d Cir. 1978), the defendant claimed that the district court had erred in failing to instruct the jury that, in order to convict him under Section 2113(d), it must find that the guns displayed during the bank robbery were "operable." The court of appeals rejected the claim on the ground that, in the absence of any proof that the guns were unloaded, the district court had properly instructed the jury that it could infer that the guns were loaded from the fact that they were displayed during the robbery. Id. at 720-721. See also United States v. Archibald, 734 F.2d 938, 943-944 (2d Cir. 1984). Thus, the court never squarely decided whether an unloaded gun is a "dangerous weapon."

3/ Under 18 U.S.C. 111 -- which makes it a crime to "forcibly assault" an officer of the United States while in the performance of his official duties and which increases the penalty where the assault is committed by use of a "deadly or dangerous weapon" -- such items as a walking stick (United States v. Logan, 551 F.2d 164 (7th Cir.), cert. denied, 433 U.S. 912 (1977)), a telephone (United States v. Farries, 459 F.2d 1057 (3rd Cir. 1972), cert. denied, 410 U.S. 912 (1973)), and a shoe (United States v. Barber, 297 F. Supp. 917 (D. Del. 1969)), have been held to qualify as a "dangerous weapon."

Nor has the Eighth Circuit held that an unloaded gun is not a dangerous weapon under Section 2113(d). In United States v. Cobb, 558 F.2d 486 (8th Cir. 1977), the court of appeals vacated the defendant's conviction under Section 2113(d), since the only evidence that the defendant had used a gun was the testimony of one witness who said she saw "two dark holes * * * protruding from the newspaper held by the robber" (id. at 488). The court concluded that this evidence "was insufficient to establish that a gun was in fact used in the robbery" (id. at 489). Although the court went on to say that a gun used during a bank robbery must be loaded to be a dangerous weapon under Section 2113(d) (ibid.), that language is dicta.

Nor is there a conflict with the Ninth Circuit. As the district court stated in United States v. Potts, 548 F. Supp. 1239, 1240 (N.D. Cal. 1982), "the issue this case presents has not been directly addressed by the Court of Appeals for the Ninth Circuit." 4/ The district court went on to conclude that an unloaded gun is not a dangerous weapon under Section 2113(d). Like petitioner, the district court thought that a contrary holding would "destroy any distinction between § 2113(a) and 2113(d)" (id. at 1240). As we have explained, this argument is unpersuasive. The distinction between Section 2113(a) and Section 2113(d) is that Section 2113(d) provides for additional

4/ In United States v. Booth, 660 F.2d 1231 (9th Cir. 1981), the court of appeals was faced with the issue of whether the district court improperly excluded from evidence a list of gun stores and ammunition that the government sought to introduce as proof that the defendant used guns and therefore "put people's lives in danger during the commission of the bank robbery" (id. at 1239). In Booth the government conceded that it had to prove that at least one of the guns was loaded (id. at 1239), so the issue of whether an unloaded gun is a dangerous weapon was not contested. In United States v. Jones, 512 F.2d 347 (9th Cir. 1975), the defendant argued that he could not be convicted under Section 2113(d) because no direct evidence was introduced that the gun in his possession during the robbery was loaded. In rejecting the claim, the court of appeals found sufficient evidence from which the jury could infer that the gun was loaded. Id. at 351-352.

punishment if a "dangerous weapon" is used, whereas Section 2113(a) does not require the use of any weapon at all. 5/

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED

Acting Solicitor General

OCTOBER 1985

5/ Responding to arguments advanced in Bennett, supra, United States v. Brannon, 616 F.2d 413, 419-420 (9th Cir.) (Sneed, J., concurring) (unloaded gun), cert. denied, 447 U.S. 908 (1980), and United States v. Beasley, supra (6th Cir.) (fake bomb), the district court also concluded that "the argument that an unloaded gun is a dangerous weapon because it can be used for pistol whipping proves too much. Any heavy metal object, wooden club, or human fist could be used to strike someone" (548 F. Supp. at 1240-1241). But metal objects and wooden clubs, like guns, are dangerous weapons, as courts construing 18 U.S.C. 111 have held (see note 3, supra). The district court also argued that "the suggestion that an unloaded gun during a robbery may trigger violent retaliation" was unpersuasive since "[a] bank robber who thrusts his fist forward inside his coat pocket and asserts that it is a gun may create a danger of retaliation" (548 F. Supp. at 1241). But it would surely have been reasonable for Congress, in enacting Section 2113(d), to conclude that a fist thrust forward inside a coat pocket does not create a danger of retaliation equivalent to the brandishing of a gun.

No. 85-5189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LAMONT JULIUS McLAUGHLIN,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S REPLY BRIEF

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IN THE

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OCTOBER TERM, 1985

No. 85-5189

LAMONT JULIUS McLAUGHLIN,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S REPLY BRIEF

In opposition to this Petition, the United States has made three points: (1) that 18 U.S.C. § 2113(a) makes it a crime to take property from a bank "by force and violence" while 18 U.S.C. § 2113(d) provides for additional punishment if a weapon is used, Memorandum for the United States in Opposition at 2-3; (2) that there is confusion but not conflict among the Circuit Courts of Appeals regarding the propriety of conviction under § 2113(d) in the face of government proof that a handgun used in perpetration of a bank robbery was, in fact, unloaded, id. at 3; and (3) that 18 U.S.C. § 2113(a) is simply designed to punish bank robberies committed without weapons while § 2113(d) is designed to punish bank robberies committed with dangerous weapons. Id. at 5.

The most cursory reading of 18 U.S.C. § 2113(a), (d), instructs the reader that § 2113(a) is designed to punish bank robberies committed without weapons while § 2113(d) punishes bank robberies committed with dangerous weapons. The distinction is between bank robberies committed without weapons and bank robberies committed with dangerous weapons. What the government would have this Court accept is the proposition that § 2113(d) punishes bank robberies committed with any weapon. Points (1) and (3) raised by the government in opposition to this Petition simply side-steps Petitioner's argument that when the government would prove a handgun used in a bank robbery is unloaded, it is not a "dangerous weapon" as envisioned by § 2113(d). (It may well be a handgun within the purview of 18 U.S.C. § 924(c) and use of it can be punished accordingly.)

That there is confusion but no conflict among the Circuits is a misleading characterization. The cases described by Petitioner, and described by the government in opposition, clearly indicate where the conflict among the Circuits is found. Most troubling to Petitioner is the government's suggestion that this Court need not review the issue presented because most bank robbers do not use unloaded guns to rob banks. Memorandum of the United States in Opposition at 3.

Thus, this Court should grant review in this case for at least two reasons: there is a conflict among the Circuits on the issue of whether an unloaded handgun constitutes a dangerous weapon under 18 U.S.C. § 2113(d) and it is simply unfair to convict someone of bank robbery by dangerous weapon when the weapon used was, in fact, not dangerous. This issue is highlighted by the fact there exist a separate statute, 18 U.S.C. § 924(c), that makes it a crime to commit a bank robbery with an unloaded handgun and provides for enhanced punishment.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5189

LAMONT JULIUS McLAUGHLIN,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the attached Petitioner's Reply Brief mailed, first-class postage pre-paid, to Charles Fried, Esquire, Acting Solicitor General, Department of Justice, Washington, D.C. 20530, this 15th day of October, 1985.

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(5)

No. 85-5189

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 5, 1985
CERTIORARI GRANTED NOVEMBER 4, 1985

JOINT

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
1984		
July 31	1	Indictment for violation of U.S.C., Title 18, Sections 2113(a)(f), 2113(b)(f), 2113 (d)(f) & 2—Bank Robbery; Bank Larceny, Assault during bank Robbery; Aiding & Abetting.
" "	7	Magistrate's Papers (Burgess) as to defendant *McLAUGHLIN* consisting of Complaint, Affadavit and Report of Proceedings.
" "	8	Financial Affadavit as to defendant *McLAUGHLIN*.
" "	9	Order (Klein, U.S. Mag.) dated July 26, 1984 "APPOINTING" Federal Public Defender as counsel on behalf of defendant *McLAUGHLIN*.
" "	10	Order (Klein, U.S. Mag.) dated July 26, 1984 that defendant *McLAUGHLIN* execute a bond in the amount of $500,000 on conditions as therein set forth.
" "	11	Order (Klein, U.S. Mag.) dated July 26 1984 "REMANDING" defendant *McLAUGHLIN* to the Custody of the United States Marshall as therein set forth.
August 10	—	Defendant *McLAUGHLIN* arraigned and plead "NOT GUILTY" as to Count No.s 1 thru 3.
Sept. 7	12	Waiver of defendant *McLAUGHLIN* of right to Trial by Jury.

DATE	No.	PROCEEDINGS
1984		
Sept. 7	—	Defendant *McLAUGHLIN* rearraigned and plead "GUILTY" as to Count Nos. 1 & 2 and "NOT GUILTY" as to Count No. 3 which was accepted by the Court.
" "	—	Case tried before the Court as to defendant *McLAUGHLIN* as to Count No. 3 only.
" "	(—)	Oral Motion of defendant *McLAUGHLIN* for Judgment of ACQUITTAL—"DENIED".
" "	(—)	Argument of Counsel.
" "	(—)	VERDICT as to defendant *McLAUGHLIN*: "GUILTY" as to Count No. 3.
" "	(—)	Imposition of sentence suspended pending presentence investigation as to defendant *McLAUGHLIN*.
Oct. 10	(—)	Sentencing Postponed as to defendant *McLAUGHLIN*.
" 31	(13)	JUDGMENT AS TO DEFENDANT *McLAUGHLIN*: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) years as to Count No. 1, and for imprisonment for a term of eight (8) years as to Count 2, and for imprisonment for a term of Twenty-Five (25) years as to Count 3, said terms of imprisonment as to Counts 1 & 2 are to run concurrent with each other and concurrent with the term of imprisonment imposed on Count 3. Defendant shall become eligible for release on parole after serving one-third (1/3) of such term of imprisonment, pursuant to U.S.C., Title 18, Section 4205(a). Order (Howard, J.) dated October 29, 1984.

DATE	No.	PROCEEDINGS
1984		
Nov. 9	(15)	Notice of Appeal of Defendant *McLAUGHLIN*.
" "	(16)	Transcript purchase order form (copy) from Defendant *McLAUGHLIN*, ordering transcript of proceedings as therein set forth.
1985		
Mar. 7	(17)	Transcript of Proceedings before the Court (Howard, J.) on September 7, 1984.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JH-84-00342

UNITED STATES OF AMERICA

v.

RONALD TYRONE HALL

and

LAMONT JULIUS McLAUGHLIN

(Bank Robbery, 18 U.S.C. Sections 2113(a), (b), (d) and (f); Aiding and Abetting, 18 U.S.C. Section 2)

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about July 26, 1984, in the State and District of Maryland,

RONALD TYRONE HALL
and
LAMONT JULIUS McLAUGHLIN

did by intimidation, take from the presence of Louise Shunkwiler, Teresa Mooney and Annetta Askins, employees of the Equitable Bank, 6029 Radecke Avenue, Baltimore, Maryland, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, money in the amount of $3,400.00, more or less, belonging to and being in the care, custody, control, management, and possession of said bank; in violation of Sections 2113(a), (f), and 2, Title 18, United States Code.

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

On or about July 26, 1984, in the State and District of Maryland,

RONALD TYRONE HALL
and
LAMONT JULIUS McLAUGHLIN

did take and carry away, with intent to steal from the Equitable Bank, 6029 Radecke Avenue, Baltimore, Maryland, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, money in the amount of $3,400.00, more or less, belonging to and being in the care, custody, control, management, and possession of said bank; in violation of Sections 2113(b), (f), and 2, Title 18, United States Code.

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

On or about July 26, 1984, in the State and District of Maryland,

RONALD TYRONE HALL
and
LAMONT JULIUS McLAUGHLIN

in committing the offenses charged in the first two counts of this indictment, did assault Louise Shunkwiler, Teresa Mooney and Annetta Askins, by pointing a firearm at them and in their direction, the said persons being in the Equitable Bank, 6029 Radecke Avenue, Baltimore, Maryland, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation; in violation

of Sections 2113(d), (f), and 2, Title 18, United States Code.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States Attorney

A TRUE BILL:

_____

Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JH-84-00342

UNITED STATES OF AMERICA

—v—

LAMONT JULIUS MCLAUGHLIN

PARTIAL TRANSCRIPT

The above entitled case came on for rearraignment before His Honor, Joseph C. Howard, on Friday, September 7, 1984, at 9:00 a.m., at Baltimore, Maryland.

[2] PROCEEDINGS

THE COURT: Mr. Better, would you like to call the case?

MR. BETTER: Yes. The government calls United States of America versus Lamont Julius McLaughlin for rearraignment, Counts 1 and 2 of the indictment, and for a nonjury trial as to Count 3.

As counsel have advised the Court in chambers this morning, this matter was scheduled for anticipated rearraignment on all three counts of the indictment. Counsel for Mr. McLaughlin, in order to preserve a legal issue that that he believes exists in the case, based upon the fact that the government's evidence would not show that the gun that was used in the robbery and was pointed at persons in the bank was loaded, that that may not be sufficient evidence for a conviction under Count 3.

The Fourth Circuit law, based upon United States v. Bennett, holds that the government does not have to prove

that the gun is loaded. Counsel believes that there are cases in other circuits which are contrary to the Bennett case and wishes to preserve that issue, so the proceeding we propose to follow is to have a guilty plea as to Counts 1 and 2 of the indictment, a not guilty plea as to Count 3. The Court would then, on the basis of a statement of facts presented by the government in support of the guilty plea, [3] rule on the sufficiency of the evidence and convict or not convict Mr. McLaughlin as to Count 3, after counsel has had an opportunity to raise that legal issue.

I understand from counsel Mr. McLaughlin is prepared to waive his right to a jury trial and will execute the appropriate form.

MR. CRIBARI: Steven Cribari, and with me at counsel table is Thomas Mason. Mr. Better's representations are exact and we agree.

• • • •

[15] THE COURT: Now, I am going to ask you gentlemen to have a seat, and call on Mr. Better to share the evidence that would be produced in this case, if the case went to trial.

MR. BETTER: Your Honor, the government's evidence [16] would show that on July 26th, 1984, at approximately 9:30 a.m. in the morning, the Equitable Bank at Cedonia Mall, Radecke Avenue in Baltimore City, was robbed by two black males, both of whom wore stocking masks and gloves, of $3400 in U.S. currency.

The two individuals entered the bank. One individual, which the evidence will show is the defendant in the case here today, Lamont Julius McLaughlin, displayed a dark handgun and ordered everyone in the bank to put their hands up and not to move. This individual remained in the lobby area and held the employees and customers in the bank at gun point.

The second robber vaulted the counter and ordered teller Theresa Mooney to open the second drawer at one

of the teller stations. He removed the money from the drawer, then proceeded to order Annetta Askins, another employee of the bank, to open the second drawer of her teller station, and the money was removed from that drawer.

According to witnesses in the bank, the vaulter appeared to notice a Baltimore City police officer outside of the bank, returned over the counter, and fled with the lobby man out of the bank. Witnesses in the bank observed that the two men as they ran out of the bank were confronted by a Baltimore City police officer.

Officer Anthony Warble, W-A-R-B-L-E, would testify [17] that he was on a routine patrol on July 26, and that as part of his duties he was making a routine check of this particular bank, and as he approached the bank he observed an individual coming from the bank with a stocking mask on. He drew his service revolver and at gun point ordered that person to halt.

Very shortly after that, a second individual ran out of the bank and he also was held at gun point until support personal arrived.

Officer Warble recovered from these two individuals a brown paper bag which the witnesses in the bank would say was used to place the money in. The bag was found with $3400 in U.S. currency with the bank bands on it. He recovered the stocking mask; two papers of rubber gloves; the handgun which was displayed by Mr. McLaughlin, the person in the lobby, which the evidence would show was not loaded; a black hat which was worn by the vaulter, according to witnesses that were in the bank.

The individual who was in the lobby and who wore a navy blue or dark hooded sweat shirt identified himself, that is Mr. McLaughlin identified himself to Officer Warble as Leslie Williams. Later at the Baltimore City Police Department, when photographs showed that Mr. McLaughlin was not Leslie Williams, Mr. McLaughlin admitted that he was Mr. McLaughlin, and then after

being advised of his rights by [18] Special Agent Steve Clary, FBI Mr. McLaughlin admitted he understood his rights and stated, "You got me dead up in this one and I confess to today's robbery."

He further admitted that he was the lobby man and stated that Ronald Tyrone Hall, who was the co-defendant in this case, was an individual that he had met at the Volunteers of America approximately one year ago.

The government would also prove that the deposits of the Equitable Bank Bank at Cedonia Mall were ensured by the F.D.I.C. on July 26th, 1984. That would be the proof if this case would have gone to trial on Counts 1 and 2, and it would also be the proof offered by the government in support of Count 3.

THE COURT: Mr. Cribari?

MR. CRIBARI: We stipulate to the evidence insofar as we need to stipulate to acknowledge. We acknowledge the proffer insofar as we need to acknowledge the proffer.

At this time as far as Count 3 is concerned, I would make a motion for judgment of acquittal.

(Discussion held off the record.)

THE COURT: Maybe you would like to waive the jury trial. I think we have a form here for you, Mr. Cribari.

(Mr. Cribari complies with request and defendant complies with request.)

MR. CRIBARI: The defendant has waived his right [19] to jury trial in writing. I would move the Court for judgment of acquittal on the third count, based in part on my reading of the case of United States versus Potts, P-O-T-T-S, 548 Fed.Supp. 1239 from the Northern District of California, 1982. That case discusses the law in the Fourth Circuit under the case of United States versus Bennett. It also discusses the law in other circuits concerning that applicable to Count 3 of the indictment and indicates that the question is not settled

whether an unloaded gun is sufficient evidence on which to predicate a conviction under Count 3, and I would ask Court to dismiss that count at this time.

THE COURT: All right. Mr. Better, would you like to be heard on the motion?

MR. BETTER: Simply to say, Your Honor, that the government's proffer would show that—has shown that Mr. McLaughlin pointed a firearm at the bank employees to hold them at bay while the vaulter removed the money, and under the law the Fourth Circuit has set forth in the Bennett case the government is not required to prove, to prove an assault under Count 3 of the indictment, that the gun was, in fact, loaded at the time.

THE COURT: All right. Stand up, gentlemen. The defendant's motion for judgment of acquittal is denied. The Court finds the defendant guilty on the statement of facts as [20] given by the government and agreed to by the defendant.

Is it still your desire, Mr. McLaughlin, to have the Court accept your plea in this case?

THE DEFENDANT: Yes.

THE COURT: I cautioned you at the outset of this hearing that you were going to be answering questions under oath. At this point let me advise you once again, you have a right to augment, to change, to amplify, or diminish any answer or answers that you have given the Court in order to bring those anwers or a particular answer within the realm of truth.

Is there any answer at all that you would like to change, in order to make that answer truthful? You can make the change without any fear of penalty or prosecution of any kind or description.

Is there any answer that you would like to change to make truthful?

THE DEFENDANT: No.

THE COURT: All right. Knowing that, it is your desire to have the Court accept your plea, one last time; is that correct?

THE DEFENDANT: Yes.

THE COURT: Mr. Cribari, is there any reason why your client's plea of guilty should not be accepted at this time?

[21] THE DEFENDANT: None that I know of.

THE COURT: The plea of guilty is accepted upon the express finding by Court that the defendant understands his rights in this matter, he understands the consequences that can come from his plea, and with that understanding is acting of his own free will in offering a plea of guilty for the reason that he, by his own testimony and by his agreement with the proffered testimony of the Assistant U.S. Attorney, is, in fact, guilty as charged in the indictment. Mr. Better.

MR. BETTER: Your Honor, I have one point and one request. Just so that it is clear, in checking my notes —if I didn't state it, I want to make it clear and would ask the Court take into consideration—as far as the statement of facts is concerned, that the firearm was pointed by Mr. McLaughlin, the evidence would show, at the—both employees and customers in the bank, including the people who are named in the indictment, the two people that I mentioned, Theresa Mooney and Annetta Askins, and that I may have made a general statement that he pointed the firearm at the employees and at the customers; and I refer to the fact that Askins and Mooney were required to open their teller drawers. I just want to make it clear the firearm was pointed at them during the course of the robbery. The witnesses would so testify, and that's what I meant to say if I didn't say that.

[22] THE COURT: Any objection to this addition to the statement of facts as given by Mr. Better?

MR. CRIBARI: No, Your Honor.

THE COURT: I think he did make a generic statement.

MR. CRIBARI: I understood him to do so. I think even the generic statement covered what he's now amend-

ing specifically. Since our issue is one of solely whether the gun was or was not loaded, and whether or not that is legally sufficient on which to predicate guilt, I do not object to the amendment.

MR. BETTER: The request I have is that the Court specifically ask the defendant whether or not he agrees with the statement of facts in support of the guilty plea and whether he's pleading guilty because he is in fact guilty of the crimes charged in Counts 1 and 2 of the indictment.

THE COURT: Did you understand the question?

THE DEFENDANT: Yes.

THE COURT: What is your answer?

THE DEFENDANT: That's true. I am pleading guilty to the indictment because it is in accord with the incident that happened.

THE COURT: Because it is in accord?

THE DEFENDANT: With the incident that happened.

• • • •

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. JH-84-00342

UNITED STATES OF AMERICA

vs.

LAMONT JULIUS MCLAUGHLIN
DEFENDANT No. 02

JUDGMENT AND COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date October 29, 1984

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

☒ WITH COUNSEL Stephen Cribari, AFPD

PLEA

☒ GUILTY, and the court being satisfied that there is a factual basis for the plea, as to Counts 1 & 2

☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a COURT verdict of ☒ GUILTY. as to Count No. 3.

Defendant has been convicted as charged of the offense(s) of Count 1—U.S.C., Title 18, Sec-

tions 2113(a)(f) & 2—Bank Robbery; Aiding & Abetting; Count 2—U.S.C., Title 18, Sections 2113 (b)(f) & 2—Bank Larceny; Aiding & Abetting; Count 3—U.S.C., Title 18, Section 2113(d)(f) & 2—Assault during Bank Robbery; Aiding & Abetting.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) years as to Count 1, and for imprisonment for a term of Eight (8) years as to Count 2, and for imprisonment for a term of Twenty-Five (25) years as to Count 3, said terms of imprisonment as to Counts 1 & 2 are to run concurrent with each other and concurrent with the term of imprisonment imposed on Count 3. Defendant shall become eligible for release on parole after serving one-third (⅓) of such term of imprisonment, pursuant to U.S.C., Title 18, Section 4205(a).

I hereby attest and certify on October 31, 1984 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

Signed by ☒ U.S. District Judge

PAUL R. SCHLITZ
Clerk, U.S. District Court
District of Maryland

/s/ Etta M. Stallings
Deputy

JOSEPH C. HOWARD
Date October 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5268(L)

UNITED STATES OF AMERICA, APPELLEE

versus

LAWRENCE EDWARD JOHNSON, JR., ETC., APPELLANT

No. 84-5335

UNITED STATES OF AMERICA, APPELLEE

versus

LAMONT JULIUS MCLAUGHLIN, APPELLANT

Appeals from the United States District Court
for the District of Maryland, at Baltimore
Joseph C. Howard, District Judge

[Filed June 5, 1985]

DECISION

Upon consideration of appellee's motion for summary affirmance in *United States v. Lamont Julius McLaughlin*, appeal no. 84-5335 and for deconsolidation of that case from *United States v. Lawrence Edward Johnson,*

Jr., a/k/a Sonny, appeal no. 83-5268(L) and the appellants' response thereto,

IT IS ORDERED that the motion for summary affirmance in appeal no. 84-5335 and for deconsolidation of the appeal from 83-5268(L) is granted.

Entered at the direction of Judge Chapman with the concurrence of Judge Sneeden and Judge Haynsworth.

For the Court,

/s/ John M. Greacen
Clerk

SUPREME COURT OF THE UNITED STATES

No. 85-5189

LAMONT JULIUS MCLAUGHLIN, PETITIONER

v.

UNITED STATES

ORDER GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 4, 1985

No. 85-5189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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for the District of Maryland
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QUESTION PRESENTED

Whether a conviction for use of a dangerous weapon during a bank robbery, in violation of 18 U.S.C. § 2113(d), despite proof by the government that the weapon used was an unloaded handgun, violated petitioner's right to a fair trial?

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OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Fourth Circuit summarily affirming Mr. McLaughlin's conviction and deconsolidating his appeal from an appeal in a related case is found in the Joint Appendix (hereinafter designated "J.A.") at 16. The district court's oral denial of Mr. McLaughlin's motion for judgment of acquittal is found at J.A. 11.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1985. J.A. 16. A petition for writ of certiorari was filed August 5, 1985, and was granted on November 4, 1985. J.A. 18.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The fifth amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. 18 U.S.C. § 2113(a) provides, in part:

> Whoever, by force and violence, or by intimidaton, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association * * * shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

3. 18 U.S.C. § 2113(d) provides, in part:

> Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or

device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT OF THE CASE

JUDICIAL HISTORY

The judicial history of this case is detailed in the Petition for Writ of Certiorari at 4-6. It is briefly summarized here.

Mr. McLaughlin and a co-defendant[1] were indicted on charges of bank robbery, bank larceny, and assault with a dangerous weapon during the commission of these offenses, in violation of 18 U.S.C. §2113(a), (b), (d), (f). J.A. 4-6. On September 9, 1984, Mr. McLaughlin entered pleas of guilty to the bank robbery and bank larceny charges (counts one and two of the indictment). The statement of facts proffered by the government as a predicate for Mr. McLaughlin's guilty plea was accepted by all parties as the stipulated evidence on which a bench trial was held on the dangerous weapon charge (count three). The district court denied Mr. McLaughlin's motion for judgment of acquittal, convicted Mr. McLaughlin of the offense stated in the third count of the indictment and accepted his guilty pleas to counts one and two. J.A. 8-13.

The trial court sentenced Mr. McLaughlin to the maximum twenty-five years imprisonment on the dangerous weapon charge, the maximum twenty years imprisonment on the assault charge, and eight years imprisonment on the bank larceny charge. These sentences are to be served concurrently. J.A. 14.

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[1] Mr. McLaughlin was indicted with Ronald Tryone Hall. Mr. Hall was not part of the appellate proceedings below and is not part of this proceeding.

Mr. McLaughlin filed a timely appeal before the United States Court of Appeals for the Fourth Circuit. Upon Mr. McLaughlin's request his appeal was consolidated, on April 10, 1985, with the appeal in the unrelated case of *United States* v. *Johnson*[2] because the sole issue in Mr. McLaughlin's appeal was one of several issues in the *Johnson* appeal.

On April 11, 1985, the consolidated appellants filed a Suggestion for Initial Hearing *In Banc*. The government filed a consolidated brief in opposition and also moved for deconsolidation and summary affirmance of Mr. McLaughlin's appeal. After a response from Mr. McLaughlin, the Fourth Circuit deconsolidated Mr. McLaughlin's appeal and summarily affirmed his conviction. J.A. 16. The proceeding before this Court has followed.

STATEMENT OF FACTS

The facts of this case are not in dispute. The government's evidentiary proffer at Mr. McLaughlin's guilty plea to bank robbery and larceny became the stipulated evidence on which a bench trial was conducted on the dangerous weapon count of the indictment.

At 9:30 a.m. on July 26, 1984, two black males wearing gloves and stocking masks entered the federally insured Equitable Bank at Cedonia Mall, Radecke Avenue, Baltimore, Maryland. One of these men was Mr. McLaughlin, who positioned himself in the lobby area and, at gunpoint, ordered everyone in the bank to put up their hands and not to move. The other was Ronald Hall, Mr.

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[2] The Federal Public Defender's Office for the District of Maryland represented Lawrence Edward Johnson, Jr., in Fourth Circuit Case No. 83-5268, as well as Mr. McLaughlin.

McLaughlin's former co-defendant. Mr. Hall vaulted over the tellers' counter and ordered one of the tellers to open a money drawer. After Mr. Hall removed the money from that drawer he repeated the procedure with another teller. When Mr. Hall noticed a Baltimore City police officer outside the bank, Mr. Hall and Mr. McLaughlin left the bank.

As they ran out of the bank, they were immediately confronted by the Baltimore City police officer, who held them at gunpoint until police support arrived. At that time, various items were seized from Mr. McLaughlin and his former co-defendant, including a brown paper bag containing $3400 in United States currency bound with bank wrappers, a stocking mask, rubber gloves, and the handgun displayed by Mr. McLaughlin while he stood in the lobby of the bank. J.A. 8-9. As the government indicated during its evidentiary proffer: "(T)he evidence would show (that this handgun) was not loaded." J.A. 9.

Mr. McLaughlin initially used an alias, but was quickly identified. He confessed to this crime and implicated his co-defendant. J.A. 9-10.

Based on this factual predicate, Mr. McLaughlin was indicted for bank robbery, bank larceny, and using a dangerous weapon during a bank robbery. Count one of the indictment alleges that he "did by intimidation, take from the presence of (the tellers) . . . the deposits . . ." in violation of § 2113(a). J.A. 4. Count three alleges that "in committing the offenses charged in the first two counts of this indictment (Mr. McLaughlin) did assault (the tellers) . . ., by pointing a firearm at them and in their direction" in violation of § 2113(d). J.A. 5.

Mr. McLaughlin pled guilty to counts one and two, which charged volations of 18 U.S.C. § 2113(a) and (b). He

was convicted after a bench trial on count three, the § 2113(d) violation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. McLaughlin was deprived of his fifth amendment right to due process of law when he was convicted for using an unloaded handgun during a bank robbery in violation of 18 U.S.C. § 2113(d).

In *United States* v. *Bennett*, 675 F.2d 596, 599 (4th Cir.), *cert. denied*, 456 U.S. 1011 (1982),[3] the United States Court of Appeals for the Fourth Circuit ruled that a weapon exhibited by a robber during a bank robbery is a dangerous weapon as a matter of law whether loaded or unloaded. This decision places the Fourth Circuit with the Fifth Circuit, Sixth Circuit, Tenth Circuit, and Eleventh Circuit in adopting the subjective approach to analyzing evidence sufficient for conviction under 18 U.S.C. § 2113(d). These circuits are primarily concerned with the subjective fear of bank robbery victims rather than the objective capability of the robber's weapon.

The Second Circuit, Third Circuit, Seventh Circuit, Eighth Circut, and Ninth Circuit reject this approach. These courts require evidence that the weapon was objectively capable of carrying out the threat apparently posed by it.[4]

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[3] It is clear from the trial court proceedings and the Motion for Summary Affirmance that Mr. McLaughlin's conviction under 18 U.S.C. § 2113(d) rests on the Fourth Circuit's decision in *Bennett*. J.A. 7-8, 10-11.

[4] The law in the First Circut is not as clear. In *United States* v. *Boyle*, 675 F.2d 430, 433 (1st Cir. 1982) (affirming a conviction based on accomplice liability) the court approved an instruction that the jury must find that the gun "was capable of being fired and inflicting serious bodily harm." In *United States* v. *Harrison*, 522 F.2d 693 (D.C. Cir. 1975), the Court followed the Second Circuit.

Thus, the United States Circuit Courts of Appeals are divided as to whether an unloaded weapon (in this case a handgun) provides a sufficient predicate for conviction under 18 U.S.C. § 2113(d), either as a matter of fact or a matter of law.

Mr. McLaughlin argues that to allow a defendant to be convicted of using a dangerous weapon during a bank robbery when there is uncontroverted proof that the weapon was an unloaded handgun renders the word "dangerous" in § 2113(d) meaningless, effectively amends the statute by judicial decision, and vitiates any meaningful distinction between § 2113(a) and § 2113(d). In addition, when the *Bennett* decision is applied to cases like Mr. McLaughlin's, persons accused of violating 18 U.S.C. § 2113(d) are presumptively convicted of that charge in violation of the principle announced in *In re Winship*, 397 U.S. 358 (1970). *See County Court of Ulster County, New York* v. *Allen*, 442 U.S. 140, 156, 167 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). Under *Bennett*, as long as a weapon is used in the commission of a bank robbery, the government bears no burden of proving that the weapon was a dangerous weapon as understood in § 2113(d). Neither may one accused of violating § 2113(d) offer any evidence that the weapon was not dangerous.

ARGUMENT

I. IT IS A DENIAL OF AN ACCUSED'S RIGHT TO A FAIR TRIAL TO RULE THAT DISPLAYING AN UNLOADED HANDGUN DURING A BANK ROBBERY IS—AS A MATTER OF LAW—EQUIVALENT TO USING A DANGEROUS WEAPON DURNG A BANK ROBBERY

In *United States* v. *Bennett*, 675 F.2d 596 (4th Cir.), *cert. denied*, 456 U.S. 1011 (1982), the United States Court of Appeals for the Fourth Circuit ruled that "(a)

weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates § 2113(d)." *Id.* at 599. By this ruling, the Fourth Circuit joined the Fifth, Sixth, Tenth and Eleventh Circuits in adopting a subjective approach to analysis of weapons violations under 18 U.S.C. § 2113(d). Directly opposed to this approach is the objective analysis followed by the First, Second, Third, Seventh, Eighth and Ninth Circuits. Mr. McLaughlin contends that the Fourth Circuit's position (and, by implication, the position of the other "subjective" Circuits) is constitutionally defective because it establishes a conclusive presumption of dangerousness that violates a basic rule of statutory construction as well as the rule of *In re Winship*, 397 U.S. 358 (1970), which forbids shifting the burden of proof in a criminal case away from the government.

A. An Unambiguous Statute Should Be Applied According To Its Terms. It Should Neither Be Rewritten Nor Interpreted By Judicial Decision

In enacting what is now 18 U.S.C. § 2113(d), Congress addressed a specific problem: "The use of dangerous weapons—most particularly firearms—to commit federal felonies." *Simpson* v. *United States*, 435 U.S. 6, 10 (1978). In enacting this legislation, Congress was responding to a nationwide request that the federal government help protect banks from robbery by "organized gangsters." *Id.*, n.4, *citing* S. Rep. No. 537, 73d Cong., 2d Sess., 1 (1934); H.R. Rep. No. 1461, 73d Cong., 2d Sess., 2 (1934). Although the legislative history of § 2113(d) is scanty, the decisions of this Court make clear that § 2113(d) proscribes the use of a dangerous weapon[5] in assaulting or

[5] The words "or device" were added to the proposed statute after debate on the House floor. *Simpson*, 435 U.S. at 10 n.4, *citing* 78 Cong. Rec. 8132-33 (1934).

jeopardizing the life of any person during a bank robbery. *Id.* at 11-12 n.6. While it may not have been clear until *Simpson* that the phrase "dangerous weapon" applied to both assaults or the jeopardizing of life (both of which are, in the alternative, outlawed by section 2113(d)), it was clear that the weapon referred to in this section was a "dangerous" weapon. That terminology appears from the very first in the available legislative history. Any ambiguity in the term "dangerous weapon" has been created by judicial decision.

By establishing a rule that any weapon openly exhibited during a bank robbery "is a dangerous weapon whether loaded or unloaded," *Bennett*, 675 F.2d at 599, the Fourth Circuit has engaged not only in unwarranted statutory construction, but statutory amendment. Under the *Bennett* decision, the word "dangerous" is effectively removed from § 2113(d) because any weapon becomes, as a matter of law, a dangerous weapon, provided it is exhibited during a bank robbery. In ruling as it did, the Fourth Circuit interpreted the word "dangerous" as describing the setting rather than the weapon. This interpretation of the word "dangerous" is not warranted. In fact, no interpretation is warranted. On its face, the statute states clearly that it is the weapon, and not the setting, that must be dangerous. The statutory history of § 2113(d) addresses the use of a dangerous weapon, as opposed to the use of any weapon in a dangerous setting. It is error for the Fourth Circuit to go beyond the plain meaning of an unambigious statute and alter its meaning beyond the original congressional intent "absent clear evidence of contrary legislative intention." *United States* v. *Apfelbaun*, 445 U.S. 115, 121 (1980). *See United States* v. *Turkett*, 452 U.S. 576, 580 (1981); *Russello* v. *United States*, 464 U.S. 16, 20 (1983).

B. An Irrebuttable Presumption That Any Weapon Used During A Bank Robbery Is, As A Matter Of Law, A Dangerous Weapon, Goes Beyond The Proper Use Of Presumptions In § 2113(d) Litigation And Violates The Principles Of Winship

The term "dangerous weapon" in § 2113(d) applies to both the assaultive conduct and the jeopardizing of life contemplated by that statute. *Simpson*, 435 U.S. at 11-12 n.6.[6] If this were not the case, the conduct proscribed by § 2113(a) (bank robbery "by force and violence, or by intimidation") would also be punishable by § 2113(d) without requiring "the commission of something more than the elements of . . . § 2113(a)." *Id.* at 12 n.6, *quoting*, *United States* v. *Beasley*, 438 F.2d 1279, 1283-84 (6th Cir. 1971) (McCree, J., concurring in part and dissenting in part). It is Mr. McLaughlin's position that a federal bank robbery assault, committed with a weapon that is not dangerous, is punishable only under § 2113(a). For enhanced punishment under § 2113(d), the weapon must, in fact, be dangerous as a weapon. It must be loaded, that is, "objectively capable of putting a victim's life in danger." *United States* v. *Cobb*, 558 F.2d 486, 488-89 (8th Cir. 1977).

Since enactment of the Federal Bank Robbery Statute, a line of cases has dealt with the nature of the govern-

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[6] Some cases have referred to § 2113(d) as the dangerous weapon statute. *See, e.g., Bennett*, 675 F.2d 596. Some refer to it as an enhanced penalty statute. *See, e.g., United States* v. *Cobb*, 558 F.2d 486 (8th Cir. 1977). Others have referred to this section as the aggravated bank robbery section. *See, e.g., United States* v. *Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866, *reh. denied*, 404 U.S. 1006 (1971). Because these are terms of description rather than legal definition they are used here interchangeably.

The Fourth Circuit views 18 U.S.C. § 2113 as stating lesser and greater included offenses. *United States* v. *Whitley*, 759 F.2d 327 (1985) *(en banc)*.

ment's proof that the weapon used during the bank robbery was a dangerous weapon, turning on whether a conviction under § 2113(d) could be sustained when there was no direct evidence that the weapon used during a bank robbery was dangerous. The courts had to consider the sufficiency of circumstantial evidence on § 2113(d) charges. The judicial response unanimously has been to allow a jury to infer the objective dangerousness of a weapon from evidence that a weapon was used, absent proof to the contrary. *See, e.g., United States* v. *Terry*, 760 F.2d 939 (9th Cir. 1985); *Bennett*, 675 F.2d at 599 (4th Cir. 1982); *United States* v. *Davis*, 560 F.2d 144 (3rd Cir.), *cert. denied*, 434 U.S. 839 (1977); *United States* v. *Newkirk*, 481 F.2d 881 (4th Cir. 1973); *United States* v. *Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States* v. *Roustio*, 455 F.2d 366 (7th Cir. 1972); *United States* v. *Waters*, 461 F.2d 248 (10th Cir.), *cert. denied sub nom. Robins* v. *United States*, 409 U.S. 880 (1972); *United States* v. *Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States* v. *Roach*, 321 F.2d 1 (3rd Cir. 1963).

When the evidence that the gun was objectively dangerous is circumstantial, and the defendant has offered evidence that the gun was not objectively dangerous, resolution of the matter is left to the jury. The jury must find beyond a reasonable doubt that the weapon was a dangerous weapon because it was objectively capable of inflicting the harm threatened by its use. *Terry*, 760 F.2d at 942; *Davis*, 560 F.2d at 147-48 (and cases cited therein). *See Ulster County Court* v. *Allen*, 422 U.S. at 167. *See also United States* v. *Waters*, 461 F.2d at 252 (a Tenth Circuit pre-*Crouthers* case).

In 1969, the Fifth Circuit went beyond prior case law in switching from an objective to a subjective analysis. It held "that a gun used in connection with and at the scene

of a bank robbery is as a matter of law a dangerous weapon and that those on the immediate scene of the robbery are placed in an objective state of danger regardless of whether there is proof that the gun was loaded." *Baker* v. *United States*, 412 F.2d 1069, 1072 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1980).[7] The Sixth Circuit announced a reasonable victim test in *United States* v. *Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866, *reh. denied*, 404 U.S. 1006 (1971). The test is not whether the weapon was in fact dangerous, but whether the victim perceived it to be. The Tenth Circuit adopted this approach in *United States* v. *Crouthers*, 669 F.2d 635, 639 (1982).

In establishing the subjective approach to § 2113(d) analysis, the Fifth Circuit found the logical base for its decision in *Baker* in fact that "(a) gun is commonly known, regarded and treated by society as a dangerous device by both the reasonable man and the person at whom it is pointed, without pause to determine whether a round is in the chamber." *Id.* at 1071-72. The Fifth Circuit noted that it is the nature of the gun to harm by discharging bullets. *Id.* at 1072. That fact, combined with a weapon's "appar-

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[7] *Baker* was followed in *United States* v. *Parker*, 542 F.2d 932 (5th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977). There, however, the court seemed to return to an objective test, noting that "the legal question . . . is . . . whether, objectively speaking, a 'life [was] actually placed in danger.'" *Id.* at 934. The court then abandons both the objective and subjective approaches and states that "(t)he use of a gun is *per se* sufficient cause to impose the enhanced sentence." *Id.*, *citing Baker*, 412 F.2d at 1072.

In 1983, the Eleventh Circuit adopted this irrebuttable presumption (or *per se* rule) that a weapon used during a bank robbery is as a matter of law a dangerous weapon. *United States* v. *Tutt*, 704 F.2d 1567, 1568 (1983).

ent capacity to carry out that harm," *id.*, combined with the highly charged atmosphere and possibility of police intervention, creates a "complex of circumstances in which the person on the scene is in jeopardy of harm which may occur in any one of various ways." *Id.*

The Fourth Circuit followed this subjective analysis when it decided *Bennett* in 1982. 675 F.2d 596. Whether a gun is loaded or unloaded, "(t)he same danger, apprehension, and tension are created" when the weapon is exhibited during a bank robbery. It threatens victims and bystanders alike." *Bennett*, 675 F.2d at 599.

In both *Baker* and *Bennett*, the only statement tending to show that a weapon is intrinsically dangerous is that made by the Fifth Circuit: "The primary capacity of a gun to harm—by the discharge of a bullet from the muzzle . . .." *Baker*, 412 F.2d at 1072. However, it is not the primary capacity of a gun to harm. It is the primary capacity of a gun to discharge a bullet from the muzzle. It is the use of the gun that causes harm. The remaining comments from both *Baker* and *Bennett* address the dangerousness of the situation created during a bank robbery. There is no gainsaying that these situations are dangerous. However, § 2113(d) of the Federal Bank Robbery Statute does not address itself to dangerous situations as § 2113(a) does. Rather, § 2113(d) focuses on dangerous weapons. The use of a dangerous weapon (and not the creating of a dangerous situation) is subject to enhanced punishment under § 2113(d).

This unwarranted and erroneous statutory interpretation has led the Fourth, Fifth, Sixth, Tenth and Eleventh Circuits to establish unconstitutional irrebuttable presumptions. These Circuits take the dangerous weapon issue away from the jury. No longer need a jury infer that

a weapon used during a bank robbery is dangerous. No longer may an accused offer proof that the weapon used was not dangerous. Rather, if a weapon was used, it is conclusively presumed to have been a dangerous weapon. *United States* v. *Tutt*, 704 F.2d 1567, 1568 (11th Cir. 1983); *Bennett*, 675 F.2d at 599; *Parker*, 542 F.2d at 934.[8]

In *Simpson*, this Court noted that ". . . (i)n order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113(d), the phrase 'by the use of a dangerous weapon or device' must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision." 435 U.S. at 12, *quoting Beasley*, 438 F.2d at 1283-84 (McCree, J., concurring and dissenting in part). Similarly, § 2113(d) must be read as requiring proof that the weapon used during the bank robbery was, in fact, dangerous. To allow the irrebuttable presumptions of the Fourth, Fifth and Eleventh Circuits to stand (and the subjective approach in general), is to render the dangerous weapon requirement of § 2113(d) meaningless, for the phrase "dangerous weapon" is then synonymous with the unmodified word "weapon." Although the Fourth, Fifth and Eleventh Circuits stop short of this legislative amendment, the interpretation followed by those Circuits is perhaps a more insidious violation of an accused's fair trial rights.

The establishment of the irrebuttable presumption lifts from the government its burden of proving beyond a reasonable doubt that a dangerous weapon was used during a bank robbery in either assaulting or jeopardizing the life of a person. Perhaps the best example of this is the indict-

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[8] It is not clear whether the Sixth and Tenth Circuits have adopted an irrebuttable presumption or only the subjective approach. *See, e.g., Crouthers*, 669 F.2d 635; *Beasley*, 438 F.2d 1279.

ment brought against Mr. McLaughlin, an indictment proper under the Fourth Circuit's decision in *Bennett*. Count three of that indictment alleges that Mr. McLaughlin, in committing the offenses described in § 2113(a) and (b), "did assault (the bank tellers) . . . by pointing a firearm at them and in their direction . . .." J.A. 5. There is no allegation that Mr. McLaughlin used a dangerous weapon in connection with an assault or in connection with the placing in jeopardy of anyone's life. Rather, language common to unenhanced assault charges is used. *See Bradley* v. *United States*, 447 F.2d 264, 274 n.19 (8th Cir. 1971) (and accompanying text). Thus, the *Bennett* decision in the Fourth Circuit has effectively altered the requirements of § 2113(d) and has taken from the government its burden of proof that an accused must have used a dangerous weapon during a bank robbery. This is a violation of the rule of *In re Winship*, 397 U.S. 358 (1970). In *Winship*, this Court ruled that the government must prove each and every element of an offense charged by proof beyond a reasonable doubt. *See Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). *See also* Ponsoldt, *A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. Crim. L.C. 363, 372-76 (1983). These errors of constitutional magnitude are not present among those circuits that follow an objective approach to § 2113(d) analysis.

The First, Second, Third, Seventh, Eighth, and Ninth Circuits have found that § 2113(d) requires more than a mere bank robbery with force and fear. *United States* v. *Roustio*, 455 F.2d at 371 (7th Cir.). Under § 2113(d), the concern is not whether weapons were used, but whether they are operable. *United States* v. *McAvoy*, 574 F.2d 718 (2nd Cir. 1978). That is, the weapons used must be "objectively capable of causing harm, *i.e.*, that the gun be loaded

and operable." *Terry*, 760 F.2d at 942 (9th Cir.); *United States* v. *Fraser*, 688 F.2d 56, 57-58 (8th Cir. 1982).

As explained by the Eighth Circuit, the conduct proscribed by § 2113(a) only rises to the status of an aggravated assault (or of putting lives in jeopardy) when there is "in addition a threat or attempt to inflict bodily harm *coupled with the present ability* to commit violent injury upon the person of another." *Bradley* v. *United States*, 447 F.2d 264, 273 (8th Cir. 1971) (emphasis is original). The apparent intentions of the robber, the apparent ability to inflict bodily harm, and the reasonable apprehension of the victim are not enough to warrant enhanced punishment under § 2113(d). *Id.* at 274. Otherwise, sections 2113(d) and 2113(a) are redundant. *Id.* at 274-75. To be convicted of assault by dangerous weapon during a bank robbery, there must be proof of the objective capability of the weapon "to cause physical harm to the victim by the means threatened." *Id.* at 275.

This approach is effected by allowing juries to infer the objective capability of a weapon used during a bank robbery. Whether this is described as the jury's right to infer dangerousness, or as the establishment of a presumption of dangerousness capable of being rebutted by proof to the contrary, the result is that the "dangerous weapon" provision of § 2113(d) is preserved and given to the jury as an issue of fact to be decided. The jury must conclude that the weapon was objectively capable of carrying out the threat, beyond a reasonable doubt. The merely apparent ability of the weapon to cause harm is not enough. *McAvoy*, 574 F.2d at 722 (2d cir.); *Marshall*, 427 F.2d at 437 (2d Cir.). Absent evidence to the contrary, a jury would be correct in inferring (or presuming) that the weapons used during a bank robbery were dangerous from the mere fact that weapons were exhibited. *See*,

United States v. *Archibald*, 734 F.2d 938, 943, *modified*, 756 F.2d 223 (2d Cir. 1984); *United States* v. *Brannon*, 616 F.2d 413, 419 (9th cir.), *cert. denied sub nom. Cox* v. *United States*, 447 U.S. 908 (1980); *United States* v. *Roach*, 321 F.2d at 5 (3rd Cir.).

The advantage of this approach is that it keeps § 2113(d) intact, keeps the burden of proof as to all elements of a criminal charge upon the government, and does not deprive an accused of a defense implicit in the statute: that the weapon was not dangerous.

However, Mr. McLaughlin takes the position that a bank robbery committed with an unloaded handgun is not, as a matter of law, a violation of § 2113(d). *Terry*, 760 F.2d at 942; *Fraser*, 688 F.2d at 57-58 (and cases cited therein); *United States* v. *Hudson*, 564 F.2d 1377, 1379 (9th Cir. 1977). In ruling that an unloaded handgun cannot provide the basis for a conviction under § 2113(d), the United States District for the Northern District of California, in *United States* v. *Potts*, 548 F. Supp. 1239 (1982), rejects the arguments of the Fourth Circuit in *Bennett*. The possible fear of the victim, the possible use of a handgun for pistol whipping, and the possibility of a violent response by police or bank guards is not a sufficient aggravation of § 2113(a) to warrant conviction under § 2113(d). If it were, it would destroy any distinction between those statutes. *Id.* at 1241.

The *Potts* court applied the objective capability test and found that proof that the handgun was loaded would be sufficient proof to support a conviction for using a dangerous weapon during a bank robbery. It rested its decision in part on the Ninth Circuit's ruling in *United States* v. *Coulter*, 474 F.2d 1004, *cert. denied*, 414 U.S. 833 (1973). In *Coulter* the Ninth Circuit ruled that a § 2113(d)

assault requires proof of an assault "plus 'a threat or attempt to inflict bodily harm, coupled with the present ability to commit violent injury upon the person of another.'" *Potts*, 548 F. Supp. 1241, *quoting Coulter*, 474 F.2d at 1005. A dangerous weapon must actually be used during the robbery and must actually place in an objective state of danger the life of the person being robbed. *Id.*

In Mr. McLaughlin's case, the Government's unrebutted proof that the handgun he displayed in the lobby of the bank was unloaded should, as a matter of law, prevent his conviction for a violation of § 2113(d).

At the very least, the issue should remain one for the jury. It should never be conclusively presumed that a weapon used during a bank robbery is, without more, a dangerous weapon according to § 2113(d) as a matter of law.[9] Instead of establishing inadvisable conclusive presumptions, the Court should allow the fact-finder to consider both the nature of the weapon used and the use made of that weapon.

Thus, the use of a loaded handgun during a bank robbery (whether established by inference or direct proof) would be sufficient for a violation of § 2113(d). Similarly, a pistol whipping with an unloaded handgun might be sufficient for a violation of § 2113(d). In the first instance, a weapon intrinsically dangerous is used. In the second instance, a sufficiently aggravating dangerous use is made of the weapon so as to satisfy § 2113(d). The Court

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[9] This is especially true given that this exact conduct is punishable under 18 U.S.C. § 924(c) (as amended by Pub. L. 98-473, Title II, § 1005(a), October 12, 1984, 98 Stat. 2138). In Mr. McLaughlin's case, the issue is not whether a charge under 18 U.S.C. § 924(c) an be sustained in addition to 18 U.S.C. § 2113(d), but whether a § 2113(d) charge can be sustained at all.

should hold unconstitutional the irrebuttable presumption that any weapon loaded or unloaded is dangerous. The Court should also disallow any conviction under § 2113(d) based solely on the actions of the victims. As has been stated above, the fear of a victim and the potentially dangerous circumstances created by a bank robbery are not in themselves sufficient evidence that the weapon used was dangerous.

It is Mr. McLaughlin's position that committing a bank robbery with an unloaded handgun is, as a matter of law, not a violation of 18 U.S.C. § 2113(d). At the very least, this Court should hold unconstitutional the Fourth Circuit's decision in *Bennett* (and, by implication, similar decisions in other circuits) that establish an irrebuttable presumption that any weapon used during a bank robbery is, as a matter of law, a dangerous weapon. At a minimum, the question should remain a jury question on which the government must carry its burden of proof and against which an accused may offer a defense.

II. GENERALLY POINTING AN UNLOADED HANDGUN IN THE LOBBY OF A BANK DURING A ROBBERY IS NOT THE CONDUCT PROSCRIBED BY § 2113(d)

The evidence in Mr. McLaughlin's case is undisputed.

During his proffer of this evidence, the Assistant United States Attorney stated that the Baltimore City police officer who arrested Mr. McLaughlin also recovered "the handgun which was displayed by Mr. McLaughlin, the person in the lobby, which the evidence would show was not loaded." J.A. 9.[10]

[10] The entire statement of facts proffered by the government in support of Mr. McLaughlin's guilty plea and adopted by both parties for the bench trial on the § 2113(d) charge is contained in the Joint Appendix at 8-12. The relevant portion of the entire proceeding is reproduced in the Joint Appendix at 7-13.

This is not a case where the government offered no proof that the handgun used during the robbery was a dangerous weapon, *i.e.*, loaded. This is not a case where the objective capability of the gun to inflict harm was disputed in contradictory evidence from both parties. Rather, this is a case where the government's own proof is that the handgun used during the robbery was not loaded. That unloaded handgun is not a dangerous weapon within the terms of § 2113(d).

Conceding that an assault was committed under § 2113(a), Mr. McLaughlin's use of an unloaded handgun is not a sufficiently aggravating factor to warrant enhanced punishment under § 2113(d). Not being loaded, the handgun could harm no one through its primary capacity of discharging a bullet from the muzzle. *See Baker*, 412 F.2d at 1072. There is no evidence that Mr. McLaughlin used the handgun in a manner which might bring it within the ambit of § 2113(d). He remained in the lobby area of the bank and generally pointed the handgun at the people in the bank. He did not approach anyone; he did not pistol-whip anyone; he did not threaten to use the gun other than by remaining in the lobby of the bank and pointing it. There is also no evidence as to the perceptions, fears, apprehensions, or anxieties of anyone else within the bank. Even conceding for the sake of argument that Mr. Laughlin's display of the handgun created apprehension and anxiety, this is still not enough to warrant enhanced punishment. In fact, it is exactly the conduct punishable by § 2113(a), to which Mr. McLaughlin pled guilty. His actions in this case certainly amounted to bank robbery "by force and violence, or by intimidation." § 2113(a). Because the weapon he used, and because the use he made of the weapon, was not dangerous, he should not stand convicted of § 2113(d).

Nevertheless, under the Fourth Circuit's decision in *Bennett*, Mr. McLaughlin's violaton of § 2113(a) is, by virtue of his having a weapon (even a non-dangerous weapon), a violation of § 2113(d) as a matter of law. This is the effect of the conclusive presumption that any weapon used in the course of a bank robbery is, whether loaded or unloaded, a dangerous weapon as a matter of law. This presumption removed from the government any burden of proving the weapon Mr. McLaughlin used was actually dangerous. It also took from Mr. McLaughlin a potential truthful defense to a § 2113(d) charge: that the weapon was objectively not dangerous.

It is Mr. McLaughlin's position that, as a matter of law, use of an unloaded weapon during a bank robbery is not a violation of § 2113(d). Even if an unloaded weapon could, under some circumstances, be found to constitute a violation of § 2113(d), the use Mr. McLaughlin made of the weapon in this case does not warrant such a conviction.

At the very least, the Fourth Circuit's *per se* rule announced in *Bennett* should be overruled. Either an unloaded handgun used during a bank robbery is not, as a matter of law, a violation of § 2113(d), or, the issue should be left as a question of fact to be determined by the fact-finder, free from the constraints of conclusive presumptions.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the attached Petitioner's Brief was mailed, first class postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530, this 13th day of December, 1985.

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No. 85-5189

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an unloaded handgun is a dangerous weapon or device within the meaning of 18 U.S.C. 2113(d), which provides for an enhanced penalty for the use of a dangerous weapon or device during a bank robbery.

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OPINION BELOW

The opinion of the court of appeals (J.A. 16-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1985. The petition for a writ of certiorari was filed on August 5, 1985, and was granted on November 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The federal bank robbery statute, 18 U.S.C. 2113, provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association * * * [s]hall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT

It is uncontested that on July 26, 1984, petitioner and Ronald Tyrone Hall entered the Equitable Bank in Baltimore, Maryland, wearing stocking masks and gloves. Petitioner displayed a handgun and ordered everyone in the bank to put their hands up and not to move. He pointed the handgun at the tellers and at

the bank customers while Hall vaulted the counter, directed the tellers to open their money drawers, and removed money from the drawers. As the two men fled the bank, they were apprehended by a police officer, who recovered from them a brown paper bag containing $3,400 in currency, the handgun displayed by petitioner during the robbery, and other items used in the robbery. The handgun was subsequently determined not to have been loaded. J.A. 8-9, 12.

Petitioner was indicted on one count of bank robbery in violation of 18 U.S.C. 2113(a), one count of bank larceny in violation of 18 U.S.C. 2113(b), and one count of bank robbery by use of a dangerous weapon or device in violation of 18 U.S.C. 2113(d). J.A. 4-5.[1] He pleaded guilty to the bank robbery and bank larcency charges. Petitioner contended that he had not violated Section 2113(d), however, because the gun he displayed during the robbery was not loaded. After a bench trial on stipulated facts in the United States District Court for the District of Maryland, he was convicted of using a dangerous weapon or device during the commission of a bank robbery in violation of Section 2113(d). He received concurrent sentences of 20 years for bank robbery, eight years for bank larceny, and 25 years for bank robbery by use of a dangerous weapon or device. J.A. 14-15.

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[1] The bank robbery count alleged that petitioner "did by intimidation, take from the presence of [three tellers], money in the amount of $3,400.00, more or less, belonging to and being in the care, custody, control, management, and possession of" a bank (J.A. 4). The bank larceny count alleged that petitioner "did take and carry away, with intent to steal" the $3,400 (J.A. 5). The aggravated bank robbery count alleged that petitioner "did assault [three tellers] by pointing a firearm at them and in their direction" (*ibid.*).

Because the Fourth Circuit had held in *United States* v. *Bennett*, 675 F.2d 596, 599, cert. denied, 456 U.S. 1011 (1982), that a gun "openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates section 2113(d)," petitioner suggested that the initial hearing on appeal be conducted en banc (Pet. Br. 3-4). The Fourth Circuit declined, and summarily affirmed petitioner's conviction (J.A. 16-17).

SUMMARY OF ARGUMENT

The issue presented in this case is whether petitioner used a dangerous weapon or device by pointing an unloaded gun at the tellers in the bank he robbed. Petitioner argues that an unloaded gun is not a dangerous weapon or device because it lacks the objective capability of inflicting harm, and a device that does not have the objective capability of inflicting harm is not dangerous. As an initial matter, petitioner is wrong because an unloaded gun—like, for example, a blackjack—is objectively capable of inflicting harm even though incapable of firing bullets; it may be used by a robber to strike bank employees or customers, as courts have long recognized. An unloaded gun is a "dangerous weapon or device" for that reason alone.

In addition, displaying a gun is dangerous because it may provoke a violent response. Therefore, a gun is a dangerous weapon even if it is unloaded because its apparent capability of inflicting harm creates danger. The language and legislative history of Section 2113(d) indicate that Congress specifically intended that section to cover the display of weapons that have

the apparent ability to inflict harm. Especially telling is the debate preceding addition of the words "or device" to Section 2113(d), which shows that this was done to make clear that the section covered weapons such as fake bombs and imitation guns.

Nearly all the state courts that have considered the question have held that state robbery statutes providing enhanced punishment for the use of a dangerous weapon during a robbery cover unloaded guns. Thus, eight states have held that an unloaded gun is a dangerous weapon when used in a robbery; only Wisconsin's courts have held to the contrary, and the Wisconsin legislature subsequently amended the State's robbery statute to provide enhanced punishment for brandishing an unloaded gun during commission of the offense. This supports our conclusion that an unloaded gun is naturally and properly considered to be a dangerous weapon or device.

Contrary to petitioner's claim, our construction of Section 2113(d) does not make Section 2113(a) mere surplusage, any more than state aggravated robbery statutes rendered their "straight" robbery statutes superfluous. A person may rob a bank without using any weapon or device at all, in which case only Section 2113(a) would be violated. Moreover, it appears that merely carrying a gun, without displaying it, is not an assault using a dangerous weapon or device, so that even some armed robberies may not be proscribed by Section 2113(d). Finally, there is no merit whatever to petitioner's assertion that the court of appeals' construction of the statute impermissibly establishes an irrebuttable presumption or otherwise interferes with the right to a fair trial.

ARGUMENT

AN UNLOADED GUN IS A "DANGEROUS WEAPON OR DEVICE" WITHIN THE MEANING OF 18 U.S.C. 2113(d)

The federal bank robbery statute, 18 U.S.C. 2113, was enacted in 1934.[2] Section 2113(a) proscribes bank robbery "by force and violence, or by intimidation," and authorizes imprisonment of violators for up to 20 years. Section 2113(d) provides that anyone who, while robbing a bank, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device" may be imprisoned for up to 25 years.[3] This Court has stated that the phrase "by use of a dangerous weapon or device" must be read, " 'regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision.' " *Simpson* v. *United States*, 435 U.S. 6, 12 n.6 (1978), quoting *United States* v. *Beasley*, 438 F.2d 1279, 1284 (6th Cir.) (McCree, J., concurring in part and dissenting in part), cert. denied, 404 U.S. 866 (1971). Thus, Section 2113(d) effectively contains two separate clauses, one proscribing assault by use of a dangerous weapon or device and another proscribing putting life in jeopardy by the use of a dangerous weapon or device. As the indictment shows (J.A. 5), petitioner was charged and convicted under the clause proscribing assault with a dangerous weapon or device.

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[2] The statute was originally codified at 12 U.S.C. (1946 ed.) 588b. It was modified without material alteration and recodified at 18 U.S.C. 2113 in 1948. *Prince* v. *United States*, 352 U.S. 322, 326 n.5 (1957).

[3] Sentences ordered under Subsections (a), (b), and (d) of Section 2113 may not be consecutive, so that the maximum sentence that may be served for a single robbery that violates all three subsections is 25 years. *Prince*, 352 U.S. at 329 & n.11.

The two courts of appeals that have squarely addressed the question whether an unloaded gun is a dangerous weapon or device within the meaning of Section 2113(d) have agreed that it is. *United States* v. *Bennett*, 675 F.2d 596, 599 (4th Cir.), cert. denied, 456 U.S. 1011 (1982); *United States* v. *Crouthers*, 669 F.2d 635, 639 (10th Cir. 1982). One district court has held to the contrary. *United States* v. *Potts*, 548 F. Supp. 1239 (N.D. Cal. 1982).[4] Petitioner argues (Br. 16-17), relying on *Potts*, that in order to establish a violation of Section 2113(d) the government must show " 'a threat or attempt to inflict bodily harm, coupled with the present ability to commit violent injury upon the person of another.' " 548 F. Supp. at 1241, quoting *United States* v. *Coulter*, 474 F.2d 1004, 1005 (9th Cir.), cert. denied, 414 U.S.

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[4] A number of courts of appeals have addressed claims that the government failed to establish that a dangerous weapon or device was used in a bank robbery because the government failed to prove that the gun the robber brandished was loaded. As petitioner states (Br. 10), those courts have unanimously agreed that the government need not prove directly that the gun was loaded. Petitioner does not disagree with such holdings, stating (Br. 15) that "[a]bsent evidence to the contrary, a jury would be correct in inferring (or presuming) that the weapons used during a bank robbery were dangerous from the mere fact that weapons were exhibited." A number of those courts, by stating that juries may infer that a gun was loaded from the fact that a robber displayed it, arguably implied that a jury must find that a gun is loaded in order to conclude that a dangerous weapon or device was used in the robbery. See, *e.g.*, *United States* v. *Wardy*, 777 F.2d 101, 105-106 (2d Cir. 1985); *United States* v. *Terry*, 760 F.2d 939, 942 (9th Cir. 1985). However, none of those courts has held directly that an unloaded gun is not a dangerous weapon or device, nor did they need to resolve that issue in light of the fact that the cases before them involved supportable jury findings that the guns were in fact loaded.

833 (1973). In petitioner's view, an unloaded gun is not capable of inflicting harm, but is only apparently capable of doing so, and accordingly he did not violate Section 2113(d). Petitioner's argument fails because an unloaded gun is capable of inflicting harm and because Congress intended Section 2113(d) to proscribe the use of weapons on the basis of their apparent ability to inflict harm.

A. An Unloaded Gun Is Objectively Dangerous Both Because It May Be Used As A Bludgeon And Because Its Display During A Robbery Creates A Materially Greater Risk Of A Violent Response By Others

1. Although a gun is normally thought of as a dangerous weapon because it may be fired, it has long been recognized that a gun is also dangerous because it may be used as a bludgeon. More than half a century ago, a California court held that an unloaded gun was a "dangerous or deadly weapon" under an aggravated robbery statute because "[i]t is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms." *People* v. *Egan*, 77 Cal. App. 279, 284, 246 P. 337, 339 (1926). As recently as last December, a court of appeals' opinion reported, in a case brought under Section 2113(d), that a bank robber used his gun to strike a security guard. *United States* v. *Wardy*, 777 F.2d 101, 103 (2d Cir. 1985).[5] Thus

[5] The court stated that "[a]s the guard started to open the outer door leading from the vestibule to the street, one of the robbers struck him on the head with a gun, spun the guard around, struck him again with the gun, and then ordered him to get behind the door" (777 F.2d at 103). The court affirmed the conviction under Section 2113(d) "[w]ithout resolving whether the use of a gun as a bludgeon—absent other circumstances present here—constitutes the use of a dangerous weapon within the scope of section 2113(d)" (777 F.2d at 105).

"[t]he flourishing or pointing of a pistol, whether loaded or not, by any able-bodied person constitutes a threat to inflict bodily injury coupled with a present ability to commit violent injury upon the person of another. Pistol whipping, at a minimum, is being threatened." *United States* v. *Brannon*, 616 F.2d 413, 419-420 (9th Cir.) (Sneed, J., concurring), cert. denied, 447 U.S. 908 (1980). See also *Bennett*, 675 F.2d at 599 ("[a] robber might well strike a recalcitrant teller with an unloaded rifle"). State courts agree that it is not necessary to show that a robber actually threatened to use an unloaded gun as a bludgeon in order to conclude that its display establishes its capability of being used in that manner. See, *e.g.*, *People* v. *Hill*, 47 Ill. App. 3d 976, 977-978, 362 N.E.2d 470, 471 (1977); *State* v. *Levi*, 250 So. 2d 751, 754 (La. 1971); *People* v. *Aranda*, 63 Cal. 2d 518, 532, 407 P.2d 265, 274, 47 Cal. Rptr. 353, 362 (1965). In short, an unloaded gun *is* capable of directly inflicting harm and it is a dangerous weapon or device for that reason.

2. Brandishing an unloaded gun during a bank robbery is also objectively dangerous because it greatly increases the risk of provoking a violent response. As the court in *Bennett* stated: "Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. * * * [A] guard or a passing policeman, seeing a rifle displayed, might well reflexively fire his weapon, endangering robbers and bystanders alike; a threatening weapon might well trigger precipitous action on the part of frightened or nervous bank employees or by-

standers." 675 F.2d at 599.[6] Therefore, an unloaded gun is a dangerous weapon because its display may provoke violence. It is sensible to punish a robber who displays a weapon more severely than a robber who does not because a robber who brandishes a weapon creates a greater risk that injury will result, even if the weapon he displays is unloaded.[7]

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[6] See also *Baker* v. *United States*, 412 F.2d 1069, 1072 (5th Cir. 1969), cert. denied, 396 U.S. 1018 (1970) ("[t]he primary capacity of a gun to harm—by the discharge of a bullet from the muzzle—plus its apparent capacity to carry out that harm, combined with a highly charged atmosphere and the possibility of action by employees or others to prevent the robbery, is a complex of circumstances in which the person on the scene is in jeopardy of harm which may occur in any one of various ways"); *United States* v. *Beasley*, 438 F.2d 1279, 1283 (6th Cir.), cert. denied, 404 U.S. 866 (1971) ("even though inert, this device [a fake bomb] put life in danger as surely as a live weapon could. * * * The threat to use any apparently deadly device is far more likely to lead to retaliation by deadly force, either by the victim, by rescuers, by the police, and, in return, by the robber, than assaultive language."); *State* v. *Levi*, 250 So. 2d at 753 ("[t]he highly charged atmosphere at the scene of a pistol-robbery is conducive to violence, whether the pistol is loaded or unloaded").

[7] It has been said that a criminal who is knowledgeable about the law might be encouraged to use a loaded gun rather than an unloaded gun when robbing a bank since the maximum penalty would be the same if courts hold that an unloaded gun is a dangerous weapon or device within the meaning of Section 2113(d). Ponsoldt, *A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. Crim. L. & Criminology 363, 389 (1983). Equally true, however, is that the rule we propose encourages knowledgeable criminals not to display any weapon at all during a bank robbery. As we will show (pages 11-13, *infra*), that is the choice Congress made.

B. The Legislative History Shows The Intent Of Congress To Include Unloaded Firearms Within The Phrase "Dangerous Weapon Or Device"

It is clear that Congress intended Section 2113(d) to punish bank robbers who inspire fear through the use of dangerous weapons or devices, whether or not those weapons or devices are objectively capable of the use to which they are normally put. Indeed, the statute's legislative history, though generally "meager" (*Prince* v. *United States*, 352 U.S. 322, 328 (1957)), is particularly enlightening on this point. An addition to the bill that became Section 2113(d) and the accompanying exchange between Congressmen make absolutely clear that Congress intended the display of a weapon or device with the apparent ability to inflict harm to be sufficient to constitute a violation of Section 2113(d). Representative Blanton was concerned that courts would not construe "dangerous weapon" broadly. He gave three examples of the sorts of instrumentalities that he thought ought to be covered but might not be covered: "a bottle of nitroglycerin," "a bottle of water asserted to be nitroglycerin," and "one of these new kind of Indiana six shooters carved out of a piece of wood with a pocket knife." 78 Cong. Rec. 8132 (1934). He noted, in the case of the bottle of water, that it "would have the same effect psychologically on the minds of the people in the bank" as an actual bottle of nitroglycerin (*ibid.*), indicating that he was of the view that the apparent ability to inflict harm was sufficient to constitute robbery by use of a dangerous weapon. The bill's manager, Congressman Sumners, agreed, suggesting that it was the perspective of the person "behind the counter" that mattered (*ibid.*). Representative Blanton proposed that the words "or device"

be added to the statute to ensure that it would be construed to cover the sorts of instrumentalities he had mentioned. Congressman Sumners, agreed, although he thought the statute already "cover[ed] the matter" (*ibid.*), and the bill was amended to proscribe robbery "by the use of a dangerous weapon or device." [8]

Thus it is clear that Congress intended Section 2113(d) to proscribe the use of weapons or devices that have the apparent capability of inflicting harm.[9] Therefore an unloaded gun is a dangerous weapon or device. Indeed, Representative Blanton gave as an example of the sort of instrumentality that he thought would be covered by the term "device" an "Indiana six shooter," which he described as a wooden gun. If a wooden gun is a dangerous weapon or device, then

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[8] Congressman Dockweiler proposed spelling out Congress's concern even more clearly, suggesting that the phrase "instrumentality intended to instill fear" be added to the part of the bill that is now Section 2113(d). Representative Blanton stated that such an addition was unnecessary, if the bill were amended as he proposed, since the addition of "'[d]evice' would cover the situation." 78 Cong. Rec. 8132 (1934).

[9] Three courts of appeals have held that fake bombs, like unloaded guns, are dangerous weapons or devices within the meaning of Section 2113(d). *United States* v. *Marx*, 485 F.2d 1179, 1185 (10th Cir. 1973); *United States* v. *Cooper*, 462 F.2d 1343, 1344-1345 (5th Cir.), cert. denied, 409 U.S. 1009 (1972); *United States* v. *Beasley*, 438 F.2d at 1282-1283. One circuit has held that a fake bomb is not a dangerous weapon or device under Section 2113(d). *Bradley* v. *United States*, 447 F.2d 264 (8th Cir. 1971). Thus, most of the courts of appeals to consider the matter have concluded that the apparent ability to cause harm is enough to satisfy the requirements of Section 2113(d), even though none of those courts of appeals indicated awareness of the significance of the addition of the words "or device" to Section 2113(d) and the exchange accompanying it.

a real gun is a dangerous weapon or device whether or not it is loaded.

C. The State Courts Agree That An Unloaded Gun Used In A Robbery Is A Dangerous Weapon

Courts in eight of the nine states to consider the question have held that an unloaded gun is a dangerous weapon under statutes authorizing additional punishment for persons who use a dangerous weapon to commit a robbery. *State* v. *Parker*, 139 Vt. 179, 183, 423 A.2d 851, 853 (1980); *State* v. *Prince*, 227 Kan. 137, 141, 605 P.2d 563, 568 (1980); *State* v. *Nichols*, 276 N.W.2d 416, 417 (Iowa 1979); *People* v. *Hill*, 47 Ill. App. 3d 976, 977-978, 362 N.E.2d 470, 471 (1977); *State* v. *Levi*, 250 So. 2d 751, 754 (La. 1971); *People* v. *Aranda*, 63 Cal. 2d 518, 532, 407 P.2d 265, 274, 47 Cal. Rptr. 353, 362 (1965); *State* v. *Montano*, 69 N.M. 332, 334, 367 P.2d 95, 96 (1961); *Hayes* v. *State*, 211 Md. 111, 116, 126 A.2d 576, 578 (1956).[10] Almost all of these courts have

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[10] Other courts have suggested that an unloaded gun is a dangerous weapon when used in a robbery. *State* v. *Herrera*, 63 Hawaii 405, 410, 629 P.2d 626, 630 (1981); *Meredith* v. *United States*, 343 A.2d 317, 320 (D.C. 1975); *State* v. *Taylor*, 408 S.W.2d 8, 10 (Mo. 1966). One state court has suggested that an unloaded gun used in a robbery is not a "deadly weapon or dangerous instrument." *Carter* v. *State*, 420 So. 2d 292, 294 (Ala. 1982). A number of other state courts have held that an unloaded gun used in a robbery is a "deadly" weapon under statutes providing enhanced punishment for the use of a deadly weapon. *State* v. *Bailey*, 273 S.C. 467, 470, 257 S.E.2d 231, 233 (1979), cert. denied, 444 U.S. 1083 (1980); *Kennedy* v. *Commonwealth*, 544 S.W.2d 219, 221 (Ky. 1977); *Campbell* v. *State*, 464 S.W.2d 334, 335 (Tenn. Crim. App. 1971). See generally Annot., 79 A.L.R.2d 1412, 1426-1430 (1971), and later case service, *id.* at 114-116 (1979); *id.* at 59-61 (Supp. 1985).

noted that an unloaded gun may be used as a bludgeon. Some have stressed the highly charged atmosphere at a robbery where the robber brandishes a gun or noted that it is the subjective impression of the victims that matters. *Prince*, 227 Kan. at 141-142, 605 P.2d at 568; *Levi*, 250 So. 2d at 753; *Hayes*, 211 Md. at 114, 126 A.2d at 578.

Wisconsin is the only state we know whose courts have held that an unloaded gun is not a dangerous weapon when used in a robbery.[11] *Lipscomb* v. *State*, 130 Wis. 238, 242, 109 N.W. 986, 988 (1906).[12] The

[11] The states are divided on the issue of whether an unloaded gun is a dangerous weapon under assault statutes providing for additional punishment for the use of a dangerous weapon in an assault, even though robbery has long been defined as combining the elements of assault and larceny. See Annot., 79 A.L.R.2d at 1415-1426. The apparent reason for this is that, although robbery "involves within it the idea of an assault, either actual or constructive," the assault involved in a robbery "is often merely constructive." *Chapman* v. *State*, 78 Ala. 463, 464 (1885) (holding that there was no assault but noting that its conclusion might have been different "if the indictment had been for robbery"). See also *Hayes* v. *State*, 211 Md. at 114-115, 126 A.2d at 578 (noting the "distinction between assault with a dangerous weapon and robbery or attempted robbery with a dangerous weapon" and stating that, in robbery cases, "it is held to be immaterial whether the pistol used to effect the taking or attempted taking is loaded or unloaded"). Thus, cases holding that an assault with an unloaded gun is not punishable as an assault with a dangerous weapon, such as *Price* v. *United States*, 156 F. 950 (9th Cir. 1907), are not on point.

[12] The court in *Lipscomb* noted that one state robbery statute prohibited robbery while "armed with a dangerous weapon, with intent, if resisted to kill or maim," and concluded that the element of intent to kill or maim if resisted was "wholly lacking" in the case of robbery by use of an unloaded gun (130 Wis. at 241, 109 N.W. at 987). The court went on to conclude that an unloaded gun is not a dangerous weapon under a similar statute, proscribing assault with a dangerous weapon with intent to rob, that did not require proof of intent to kill or maim if resisted (130 Wis. at 241, 109 N.W. at 988).

Wisconsin Supreme Court followed *Lipscomb* in *Luitze* v. *State*, 204 Wis. 73, 78-80, 234 N.W. 382, 383 (1931), but the court suggested that it would be advisable to amend the State's statutes to provide that the use of a gun, "whether loaded or unloaded," would constitute robbery by use of a dangerous weapon. The Wisconsin legislature subsequently amended the statute to the end suggested by the court. See *State* v. *Antes*, 74 Wis. 2d 317, 326 n.3, 246 N.W.2d 671, 675 n.3 (1976). The Wisconsin statutes now provide that robbery "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon" is subject to additional punishment. Wis. Stat. Ann. § 943.32 (2) (West 1982). Since a robbery victim would reasonably believe that a gun pointed at him is dangerous, robbery by use of an unloaded gun is now subject to added punishment in Wisconsin as well as elsewhere.[13]

[13] Fifteen other states have statutes that on their face appear to make the use of an unloaded gun during a robbery subject to enhanced punishment to the same extent as the use of a loaded gun. Alaska Stat. § 11.41.500 (1983) (first-degree robbery includes representation "by words or other conduct that person * * * is armed with a dangerous instrument"); Ariz. Rev. Stat. Ann. § 13-1904(A)(2) (Supp. 1985) (armed robbery includes use of "a simulated deadly weapon"); Ark. Stat. Ann. § 41-21-2(1)(a) (1977) (aggravated robbery includes representation "by word or conduct that he is * * * armed"); Del. Code Ann. tit. 11, § 832(a)(2) (1979) (first degree robbery includes displaying "what appears to be a deadly weapon"); Ga. Code Ann. § 16-8-41 (1982) (armed

The fact that the states have nearly unanimously concluded that an unloaded gun used in a robbery is a dangerous weapon supports our contention that that

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robbery includes the use of a "device having the appearance of [an offensive] weapon"); Mich. Comp. Laws Ann. § 750.529 (West 1968) (armed robbery includes the use of "any article used or fashioned in a manner to lead the person so assaulated to reasonably believe it to be a dangerous weapon"); Mo. Ann. Stat. § 569.020.1(4) (Vernon 1979) (first-degree robbery includes cases where robber "[d]isplays or threatens the use of what appears to be a deadly weapon or dangerous instrument"); N.H. Rev. Stat. Ann. § 636:1(III)(b) (1974) (robbery is class A felony if robber "reasonably appeared to the victim to be armed with a deadly weapon"); N.D. Cent. Code § 12.1-22-01.2 (1976) (aggravated robbery if robber "possesses or pretends to possess a firearm"); Okla. Stat. Ann. tit. 21, § 801 (West 1983) (aggravated robbery if robber uses a firearm, "whether the firearm is loaded or not"); 18 Pa. Cons. Stat. Ann. § 3701(a)(1) (Purdon 1983) (first-degree robbery if robber puts victim "in fear of immediate serious bodily injury"); S.D. Codified Laws Ann. § 22-30-6 (1979) (first-degree robbery includes "putting the person robbed in fear of some immediate injury to his person"); Utah Code Ann. § 76-6-302(1)(a) (1978) (aggravated robbery includes use of "a facsimile of a firearm"); Wash. Rev. Code Ann. § 9A.56.200(1)(b) (1977) (first-degree robbery includes displaying "what appears to be a firearm or other deadly weapon"); Wyo. Stat. § 6-2-401(a)(ii) (1983) (aggravated robbery includes use of "a simulated deadly weapon").

Two states have statutes that on their face appear to make robbery by use of an unloaded gun the second of three degrees of robbery. N.Y. Penal Law § 160.10(2)(b) (McKinney 1975) (second-degree robbery if robber displays "what appears to be a pistol"); Or. Rev. Stat. § 164.405 (1985) (second-degree robbery if "armed with what purports to be a dangerous or deadly weapon"; but see *State* v. *Vance*, 591 P.2d 335, 362 (Or. 1979) (concurring opinion) (suggesting that use of an unloaded gun is third-degree robbery)).

Two states have statutes that on their face suggest that robbery by use of an unloaded gun is not an aggravated of-

conclusion is in accordance with the meaning Congress intended for the phrase "dangerous weapon or device." [14]

D. Concluding That An Unloaded Gun Is A Dangerous Weapon Does Not Negate Section 2113(a) Or Create An Unconstitutional Irrebuttable Presumption

Neither petitioner's claim that our interpretation of Section 2113(d) renders Section 2113(a) superfluous nor his argument that the Fourth Circuit has created an unconstitutional irrebuttable presumption has merit.[15]

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fense. Colo. Rev. Stat. § 18-4-302 (1978) (possession of article appearing to be a deadly weapon is "prima facie evidence" that robber was armed); Conn. Gen. Stat. Ann. § 53a-134 (1985) (provides that it is an affirmative defense to first-degree robbery if "firearm was not a weapon from which a shot could be discharged").

[14] Similarly, the fact that so many states have statutes that on their face appear to provide enhanced punishment for the use of an unloaded gun during a robbery (see note 13, *supra*) supports our argument that it is sensible to punish robbery by use of an unloaded gun more severely than robbery where no weapon is displayed.

[15] Petitioner has wisely refrained from arguing that the rule of lenity requires that the phrase "dangerous weapon or device" be construed to exclude an unloaded gun, since invocation of that rule would be inappropriate in this case. This Court has stated that "[a]lthough penal laws are to be construed strictly, they 'ought not to be construed so strictly as to defeat the obvious intention of the legislature.'" *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), quoting *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829). As we have shown, Congress clearly intended Section 2113(d) to proscribe the use of weapons that appear dangerous. Furthermore, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget

1. Contrary to the opinion of the district court in *Potts*, the conclusion that an unloaded gun is a dangerous weapon or device under Section 2113(d) does not "destroy[] any distinction between 2113(a) and 2113(d)" (548 F. Supp. at 1240), any more than the decisions of the many courts that have held that robbery by use of an unloaded gun is first-degree robbery eliminated second-degree robbery. A robber may attempt to rob a bank without using any weapon at all. For example, a robber could grab a bank employee and threaten to beat or strangle him. Robbers frequently pass notes to tellers demanding money and suggesting that they are armed, although they may be unarmed.[16] In such cases, Section 2113(a) clearly applies and Section 2113(d) does not.

Even in the case of a robber who is in fact armed, there are situations where Section 2113(a) applies although Section 2113(d) may not. For example, if a robber approaches a teller and demands money, without displaying a weapon, it appears that the robber would not be subject to punishment under Section 2113(d), even if in fact the robber has a concealed weapon.[17] The reason for that, in the lan-

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one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). That a gun, loaded or unloaded, is a dangerous weapon when used in a robbery is clear, as the near unanimous agreement with that conclusion by the state courts shows.

[16] That was appparently the case in *United States* v. *Brown*, 412 F.2d 381 (8th Cir. 1969). In that case the robber approached a teller and passed her a note stating: "This is a Hode [*sic*] up. If you say a word I will kill you." *Id.* at 382. After the teller demanded to see his gun, and the robber declined to show it, the teller screamed: "Show me your gun, you little snot, or get out of here." *Ibid.* The robber left empty-handed.

[17] See *United States* v. *Wardy*, 777 F.2d 101, 105 (2d Cir. 1985) ("if the police apprehended a bank robber during the

guage of the statute, is that the robber has not "used" the weapon to "assault" anyone, as Section 2113(d) requires.[18] By keeping his weapon concealed, the robber has not created the sort of charged atmosphere likely to provoke violence described by the Fourth Circuit in *Bennett*. A robber who might have a gun in his pocket may inspire some apprehen-

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course of a robbery and subsequently discovered that he had carried a gun concealed in his belt or in a shoulder holster, a conviction under § 2113(d) would probably be unwarranted").

[18] It appears that Congress is of the view that something more than the carrying of a gun is required to establish its use. In response to this Court's decisions *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), Congress amended 18 U.S.C. 924(c) in 1984 to provide an additional penalty of five years' imprisonment for anyone who "uses or carries" a firearm during a crime of violence, including a "crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Thus, the additional penalty of Section 924(c) now applies even though the defendant is convicted under a provision like Section 2113(d) that provides for an enhanced penalty for the use of a dangerous weapon or device. In spelling that out in the legislative history, in fact, Congress used Section 2113(d) as an example, stating that a person convicted under Section 2113(d) would also be subject to five years' imprisonment under Section 924(c) if the dangerous weapon or device was a firearm. S. Rep. 98-225, 98th Cong., 1st Sess. 313-314 (1983). In its example, the Senate report referred to "using a gun * * * by pointing it at a teller or otherwise displaying it." *Id.* at 314. In a footnote, the report noted that "evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm" under Section 924(c). S. Rep. 98-225, *supra*, at 314 n.10. Thus, Congress appeared to understand, as the language of Section 924(c) suggests, that there is a distinction between carrying a gun and using a gun.

sion, but certainly not to the same degree as a robber who has a gun in his hand, especially one who is pointing it at someone. Thus there is much less danger that a guard or a passing policeman will reflexively fire, endangering bank employees and customers. Furthermore, any danger of pistol whipping is at least less imminent when a gun is not on display. In short, the brandishing of a gun creates special dangers, and it is reasonable to construe Section 2113(d) as being addressed to that added danger.[19] So construed, Section 2113(d) is clearly not at all redundant with Section 2113(a).

2. The bulk of petitioner's brief (at 9-18) is devoted to the wholly untenable argument that the Fourth Circuit's decision in *Bennett* established an unconstitutional irrebuttable presumption in violation of the rule that the government must prove each element of the offense charged beyond a reasonable doubt.[20] To

[19] Carrying a firearm also warrants additional punishment, but Section 924(c) is addressed to that problem. See note 18, *supra*.

[20] Petitioner's argument concerning irrebuttable presumptions appears to be based on the discussion of Section 2113(d) in Ponsoldt, *supra*. Professor Ponsoldt in that article repeatedly refers to the aggravated offense punished by Section 2113(d) as "jeopardizing life" (74 J. Crim. L. & Criminology at 385, 386, 388), neglecting the fact that the section contains a clause prohibiting assault using a dangerous weapon or device as well (see page 6, *supra*). Moreover, while acknowledging that Congress could properly determine that the use of an unloaded gun is covered by Section 2113(d) (74 J. Crim. L. & Criminology at 389), Professor Ponsoldt appears to have been unaware of the evidence that Congress intended Section 2113(d) to apply whenever an apparently dangerous weapon is used in a bank robbery and added the words "or device" to the section in order to make that intention clear (see pages 11-13, *supra*).

the extent that petitioner argues in this section that a gun must be capable of firing or it is not a dangerous weapon or device, his argument, while wrong, is at least relevant to the issue of statutory construction before this Court. If, contrary to our argument, this Court determines that an unloaded gun is not a "dangerous weapon or device" within the meaning of Section 2113(d), then petitioner is of course entitled to have his conviction for violating that section vacated. In the future, the government would not be able to argue that brandishing an unloaded gun is the use of a dangerous weapon under Section 2113(d), at least in the absence of different facts such as the actual use of the gun as a bludgeon. But petitioner's repeated claim that the Fourth Circuit has established an irrebuttable presumption (Br. 9, 11 n.7, 12, 13, 18) adds nothing to his argument. If under the correct interpretation of the statute an unloaded gun is a dangerous weapon or device when used in a bank robbery, then the government must establish beyond a reasonable doubt that a bank robber brandished a gun during a bank robbery. But there is no reason why the legal question whether displaying an unloaded gun is the use of a dangerous weapon or device should be left to the jury in each case, as petitioner appears to suggest (Br. 17).[21] In short, petitioner's discussion of presumptions is beside the point.

[21] Moreover, we are puzzled by petitioner's repeated references to jury deliberations. Petitioner waived his right to a jury trial (J.A. 8) and argues (Br. 17) that an unloaded gun is not a dangerous weapon or device as a matter of law. No jury instructions are involved in this case. Accordingly, the question of what issues should be decided by a jury is not presented in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 85-5189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

MR. McLAUGHLIN WAS UNFAIRLY CONVICTED OF VIOLATING 18 U.S.C. SECTION 2113(d) BECAUSE THE UNLOADED HANDGUN HE DISPLAYED IS NOT A DANGEROUS WEAPON WITHIN THE MEANING OF 18 U.S.C. SECTION 2113(d)

Mr. McLaughlin was indicted under 18 U.S.C. Section 2113(d) for committing an assault with a dangerous weapon or device during a bank robbery. The indictment specifically states that he "did assault [three tellers] by pointing a firearm at them and in their direction." J.A. 4; Brief for the United States at 3 n.1. The Government conceded that the handgun was not loaded. J.A. 9. However, in the Fourth Circuit,[1] an unloaded handgun is, as a matter of law, a dangerous weapon for purposes of enhanced punishment under 18 U.S.C. Section 2113(d). *Bennett*, 675 F.2d 596.

A. The Legislative History Does Not Show That It Was Congress's Intent To Include Unloaded Firearms Within The Phrase "Dangerous Weapon Or Device"

The Government has argued that the legislative history of Section 2113(d) demonstrates Congress's intent to punish the use of dangerous weapons even if those weapons were not objectively capable of inflicting the harm threatened. The Government's position is that the floor exchange between the bill's manager, Congressman Sumners, and other Congressmen, demonstrates this intent. However, careful reading of the floor exchange reveals a

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[1] *United States* v. *Bennett*, 675 F.2d 596, 599 (4th Cir.), *cert. denied*, 456 U.S. 1011 (1982) ("A weapon openly exhibited by a robber during a robbery *is* a dangerous weapon whether loaded or unloaded, and such exhibition violates §2113(d)." (emphasis added)).

far different implication than the one drawn by the Government.

> MR. DOCKWEILER: May I say that a man might go into a bank with intent to rob and use a gas bomb, which would not in itself be dangerous.
>
> MR. BLANTON: Yes; or he might use one of these new kind of Indiana six shooters carved out of a piece of wood with a pocketnife.
>
> MR. SUMNERS OF TEXAS: I suggest to the gentleman that section 2 covers the matter, although I have no objection to adding the words "or device."

78 Cong. Rec. 8132 (1934). Section 2 was the section which covered bank robbery by trick, artifice, or fraud and presaged Section 2113(b) (bank larceny). Section 4(a) was a precursor of Section 2113(a) (bank robbery assault) while section 4(b) was a precursor of Section 2113(d). Thus, the bill's manager was suggesting that using a fake weapon to commit a bank robbery would be covered under the section punishing bank larceny by trick, artifice, or fraud, and not section 4(b) (dangerous weapons).

Moreover, section 4(a) covered bank robbery "by force and violence, or by putting in fear." 78 Cong. Rec. 8132. The discussion in the legislative history about putting people in fear by exhibiting bottles of nitroglycerin (whether real or fake) suggests that such items are covered by the "putting in fear" language of section 4(a). This section is now Section 2113(a) which punishes bank robbery assault.

The conclusion to be drawn from the legislative history is that the exhibition of unloaded handguns without more would warrant punishment under what is now Section 2113(a) and (b). More is needed under Section 2113(d). *See*

Bradley v. *United States*, 447 F.2d 264, 273-75 (8th Cir. 1971).

B. An Unloaded Handgun Is Not An Objectively Dangerous Weapon Simply Because It Might Provoke A Violent Response By Others Or Could Be Used As A Bludgeon

The Government argues: "Brandishing an unloaded gun during a bank robbery is also objectively dangerous because it greatly increases the risk of provoking a violent response."[2] Brief for the United States at 9. Of course, it is not the brandishing of the gun which must be objectively dangerous but rather the gun itself, for Section 2113(d) punishes an assault on a person during a bank robbery "by the use of a dangerous weapon." If the weapon is not objectively dangerous, then raising the specter of potentially "deadly retaliation is inapposite since no dangerous weapon was used as Section 2113(d) plainly requires under that aggravating alternative." *United States* v. *Beasley*, 438 F.2d 1279, 1285 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971) (McCree, J., concurring in part and dissenting in part). If Section 2113(d) protects people not from dangerous weapons but rather from fear and the invited or uninvited responses of third parties, then it follows that there is little difference (for Section 2113(d)) between a loaded or unloaded handgun and "the pointing by the robber in his coat pocket of his finger or hand so as to make the victim believe the bulge to be a pistol which the robber intended to use in the event of the

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[2] In Mr. McLaughlin's case, the danger of police response was imminent: While in the bank, Mr. McLaughlin's codefendant seemed to notice a city police officer outside the bank. When he and Mr. McLaughlin quickly exited the bank they were immediately confronted by that police officer who had drawn his service revolver. J.A. 9. No one was injured.

victim's resistance." *Campbell* v. *State*, 464 S.W. 2d 334, 337 (Tenn. 1971) (Galbreath, J., dissenting). If the purpose of Section 2113(d) is to protect victims from fear and the actions of third parties, then the source of the fear is immaterial. *Id.*

The Government also has advanced the argument, based on *United States* v. *Wardy*, 777 F.2d 101 (2nd Cir. 1985), that an unloaded handgun is a dangerous weapon because it could be used as a bludgeon. *Wardy*, like many of the state cases cited by the Government, is a case where a handgun not only could have been used as a bludgeon but was, in fact, used as a bludgeon. Also, the court noted that "the jury was entitled to infer that the gun was loaded." *Id.* at 106. In other words, *Wardy*, and cases on which it relies, merely holds that an unloaded handgun used as a bludgeon and which a jury could infer was loaded, could be a dangerous weapon under the federal bank robbery statute. *See id.* at 105.[3]

Similarly, the Government relies on Judge Sneed's concurring opinion in *United States* v. *Brannon*, 616 F.2d 413, 419-20 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980), to support the proposition that the flourishing of an unloaded handgun is a violation of Section 2113(d) because pistol whipping is being threatened. However, the majority opinion based its holding on the fact that "(a)bsent evidence to the contrary, if a gun is used during a bank robbery, the jury may infer that the gun was loaded." *Id.* at 419.

The Government has relied on many state cases to support the proposition that an unloaded handgun's

[3] For surveys of federal and state cases dealing generally with the issue, *see* Annot., 32 A.L.R. Fed. 279 (1977); 81 A.L.R. 3d 1006; 79 A.L.R. 2d 1412 (1971).

potential use as a bludgeon warrants punishment for use of a dangerous weapon during a bank robbery. However, virtually all of these cases are cases where either the handgun was in fact used as a bludgeon, or where there was a specific definitional statute defining a bludgeon (or unloaded handgun) as a dangerous weapon, or where there was sufficient evidence in the record to support the jury's inference that the gun was loaded.

The Government has also cited many state statutes in support of the proposition that an unloaded handgun used during the robbery is a dangerous weapon. The implication, of course, is that an unloaded handgun similarly ought to be found to be a dangerous weapon for purposes of Section 2113(d). More important than the states' conclusion that an unloaded handgun can be a dangerous weapon when used during a bank robbery is the fact that it is a legislative decision.

Absent a definitional statute (present in virtually all state cases or statutes on which the Government relies), there is no authority for concluding an unloaded handgun is a dangerous weapon *unless* the fact-finder can infer from the gun's use that it was loaded. This is a question of fact and not a question of law.[4]

C. Displaying An Unloaded Handgun During A Bank Robbery Is Punishable Under 18 U.S.C. Section 924(c).

The Government could have used 18 U.S.C. Section 924(c) to convict Mr. McLaughlin. A conviction for bran-

[4] Of course, the Government relies upon *United States* v. *Bennett*, 675 F.2d 596 (4th Cir.); *United States* v. *Crouthers*, 669 F.2d 635 (10th Cir. 1982); *United States* v. *Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971), and *Baker* v. *United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970). It is the Fourth Circuit's decision in *Bennett* and, by implication, the decisions of the companion circuits, that are challenged in this instant proceeding.

dishing an unloaded handgun during a bank robbery would warrant the mandatory punishment of Section 924(c), since an unloaded handgun falls within the definition of a firearm according to 18 U.S.C. Section 921(a)(3).[5] However, if there is no requirement that the weapon itself be objectively dangerous, then there is no distinction between Section 2113(d) and Section 924(c). Similarly, if there is no requirement that the handgun be objectively dangerous, there is no distinction between Section 2113(a) and Section 2113(d). *Bradley*, 447 F.2d at 273-75. The use of a handgun in a Section 2113(a) assault should not also be punished under Section 2113(d) unless the weapon was objectively dangerous.

D. When A Court Holds That The Exhibition Of An Unloaded Handgun Without More Is Proof That The Handgun Was A Dangerous Weapon, It Establishes An Unconstitutional Irrebuttable Presumption

If this Court rules that the brandishing of an unloaded handgun during a bank robbery *without more* is, as a matter of law, use of a dangerous weapon during a bank robbery, then there would be nothing unconstitutional in the irrebuttable presumption established by *Bennett:* that the exhibition of a weapon by a robber during a bank robbery "is a dangerous weapon whether loaded or unloaded." 675 F.2d at 599. However, if this Court rules that an unloaded handgun displayed during a bank robbery either is not as a matter of law a dangerous weapon,

[5] At the time Mr. McLaughlin committed the bank robbery for which he was convicted, he could not have been consecutively punished under 18 U.S.C. § 924(c) as well as under 18 U.S.C. § 2113(d). *Simpson* v. *United States*, 435 U.S. 6 (1978). However, since the Comprenehsive Crime Control Act of October 12, 1984, consecutive punishment under both statutes would be permissible.

or that it *can be* a dangerous weapon depending on the circumstances of its use, then the irrebuttable presumption established by *Bennett* is unconstitutional, for it would effectively remove from the finder of fact the necessity of drawing a conclusion that the weapon that could be dangerous was, in fact, dangerous.

Assuming that this Court rules that an unloaded handgun *could be* a dangerous weapon under Section 2113(d), the Fourth Circuit's holding in *Bennett* would unconstitutionally relieve the Government of the burden of proving that a particular unloaded handgun was, in fact, a dangerous weapon. *In re Winship*, 397 U.S. 358 (1970).

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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